122, 189

122, 189

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 186.

LIZZIE TUTTLE, ADMINISTRATRIX OF ORSON TUTTLE, DECEASED, PLAINTIFF IN ERROR,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 23, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 186.

LIZZIE TUTTLE, ADMINISTRATRIX OF ORSON TUTTLE, DECEASED, PLAINTIFF IN ERROR,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Citation	1	1
Proof of service of citation	2	1
Writ of error	3	1
Bond	5	2
Declaration	6	3
Waiver for securities for costs	10	7
Plea	11	7
Trial	12	7
Amended declaration	13	8
Verdict	16	11
Order allowing amendment to declaration	17	12
Motion for new trial	18	12
Affidavit of J. C. McArthur	19	13
Oscar M. Springer	20	14
Order denying new trial	21	14
Judgment	21	15
Bill of exceptions	22	15
Testimony of James Keith	22	15
Henry E. Stevens	49	29

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Testimony of Wm. Braithwaite	65	38
James Keith (recalled)	67	39
Alvin Hall	70	40
Edmund Barber	72	41
Henry D. Ludden	75	42
Edmund Barber (recalled)	78	44
Henry J. Lovett	79	45
Wm. Cipher	88	49
Harlow P. Davock	90	50
Lizzie Tuttle	94	52
Wm. Braithwaite (recalled)	103	56
George Masson	106	58
Wm. J. Morgan	120	66
Willis C. Beal	123	67
James Keith (recalled)	126	69
James E. Brody	124	70
Henry E. Stevens (recalled)	133	72
Michael Griffin	134	73
Plaintiff's requests	140	76
Charge of the court	145	78
Exhibit C—Diagram	153	81
B— "	154	81
A— "	155	81
Clerk's certificate	157	82

1 *Citation.*

United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Lizzie Tuttle, administratrix of the estate of Orson Tuttle, deceased, is plaintiff in error, and The Detroit, Grand Haven and Milwaukee Railway Company is defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry B. Brown, district judge of the United States for the eastern district of Michigan, this 27th day of September, in the year one thousand eight hundred and eighty-three.

HENRY B. BROWN,

2 *District Judge, East. Dist. of Michigan.*

To The Detroit, Grand Haven & Milwaukee Railway Company, defendant in error.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Oscar M. Springer, being duly sworn, deposes & says that on the 4th day of October, 1883, he served a true copy of the above & foregoing citation upon George Jerome, Esq., the attorney for said defendant in error in the court below, by delivering the same to him in person at Detroit, in said district.

OSCAR M. SPRINGER.

Subscribed & sworn to before me this 4th day of October, 1883.

HERSCHEL WHITAKER,
U. S. Commissioner, East. Dist. of Mich.

[Endorsed:] No. 6835. U. S. circuit court for the eastern district of Michigan. Lizzie Tuttle, adm'x, *vs.* The Detroit, Grand Haven and Milwaukee Railway Company. Citation. Returned & filed October 4th, 1883. Jno. Graves, deputy clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Lizzie Tuttle, administratrix of the estate of Orson Tuttle, deceased, plaintiff, and The Detroit, Grand Haven and Milwaukee Railway Company, defendant, a manifest error hath happened, to the great damage of the said Lizzie Tuttle, administratrix of the estate of Orson Tuttle, deceased, as by her complaint

appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of September, in the year of our Lord one thousand eight hundred and eighty-three.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Sixth Circuit and the Eastern District of Michigan.

Allowed by—

——— ———.

4 [Endorsed:] 6835. U. S. circuit court, E. D. of Mich. Lizzie Tuttle, adm'x, *v.* D., G. H. & M. R'y Co. Writ of error. Filed in clerk's office Sept. 27, 1883. Walter S. Harsha, clerk.

5 *Bond on Writ of Error.*

Know all men by these presents that we, Fred. A. Baker and Edmund Hall, are held and firmly bound unto the Detroit, Grand Haven and Milwaukee Railway Company in the full sum of two hundred dollars, to be paid the said Detroit, Grand Haven and Milwaukee Railway Company, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of September, in the year one thousand eight hundred and eighty-three.

Whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between Lizzie Tuttle, administratrix of the estate of Orson Tuttle, deceased, plaintiff, and the Detroit, Grand Haven and Milwaukee Railway Company, defendant, a judgment was rendered against the said Lizzie Tuttle, and the said Lizzie Tuttle having sued out a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said Detroit, Grand Haven and Milwaukee Railway Company, citing them to be and appear at a Supreme Court of the United States to be holden at Washington, the third Monday of October next: Now the condition of the above obligation is such that if the said Lizzie Tuttle shall prosecute the said writ of error to effect and answer all damages and

costs if she fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

FRED. A. BAKER. [L. S.]
EDMUND HALL. [L. S.]

Signed, sealed, and delivered in presence of—
OSCAR M. SPRINGER.

I approve of the above and foregoing bond and of the sureties thereon.

HENRY B. BROWN,
District Judge.

Filed in clerk's office Sept. 27, 1883.
WALTER S. HARSHA, *Clerk.*

6 In the Circuit Court of the United States for the Eastern District of Michigan.

UNITED STATES OF AMERICA, *Eastern District of Michigan,* } ss:

Lizzie Tuttle, a resident of Garrett, in the county of De Kalb, in the State of Indiana, widow of Orson Tuttle, deceased, and administratrix of his estate, and who is a citizen of the State of Indiana, plaintiff herein, by Oscar M. Springer, her attorney, complains of the Detroit, Grand Haven and Milwaukee Railway Company, a corporation organized and existing under the laws of the State of Michigan, and who is a citizen of the State of Michigan, defendant herein, in a plea of trespass on the case, filing this her declaration as commencement of suit:

For that whereas heretofore, to wit, on or about the 30th day of October, A. D. 1882, the said Orson Tuttle was in the employ of the said defendant in the city of Detroit and county of Wayne aforesaid, and working for the said defendant at the "Detroit, Grand Haven and Milwaukee yards," and in the course of his ordinary employment he was ordered by the said defendant to couple some cars which were standing on a certain track known as or called "boot-jack siding." The said siding is a double curve track containing a a very sharp curve; said Orson Tuttle, in compliance with the order and request of the said defendant, proceeded to couple certain cars on said siding, which were near a certain boat-slip, viz., a car belonging to the said defendant and a car belonging to the "Wabash and Erie Dispatch," and while the said Orson Tuttle was thus employed and in the act of [or] endeavoring to couple said cars the draw-heads of said cars failed to meet, and passed each other, allowing the said cars to come so close together that he, the said Orson Tuttle, was crushed to death thereby. The said Orson Tuttle having made two attempts to couple the said cars on the said siding, in compliance with the said defendant's command, prior and just before making the fatal and last attempt, and not succeeding, he then attempted to place the coupling link of said cars upon the "draw-heads" of said cars for the purpose of making the desired coupling, when, having given the

signal to back in order to make said coupling, the "draw-heads" of said cars failed to meet and passed each other, allowing the said cars to go so close together that the said Orson Tuttle was crushed to death as aforesaid while in the exercise of due and reasonable care and without fault or negligence on his part, through the negligence and want of care or skill of said defendant heretofore set forth. There were no "bumpers" nor other device on either of the said cars to prevent them going together in case said "draw-heads" failed to meet and passed each other as aforesaid. The only device or invention on said cars for the purpose of keeping them apart and to receive the concussion in coupling was the "draw-heads" aforesaid, to wit, at Detroit aforesaid;

And whereas the said defendant, in the construction of its said car, not regarding its duty to protect the life of its said employee, neglected to adopt the long-known device called a double dead-wood, which would have prevented said cars from going so close together and whereby the said Orson Tuttle's life would have been saved under the circumstances hereinbefore set forth, to wit, at Detroit aforesaid;

And whereas, the said defendant, in the construction of its said "boot-jack siding," so called, negligently and unskillfully
7 constructed the same with so sharp a curve that the "draw-heads" of said cars failed to meet and passed each other, thereby causing the death of the said Orson Tuttle as and while in the act or endeavoring to couple the said cars aforesaid, to wit, at Detroit aforesaid;

By reason of the premises an action hath accrued to the said plaintiff as such administratrix for the benefit of said Lizzie Tuttle, widow of said deceased, and Bertha Viola Tuttle and Mandena Tuttle, the children and heirs-at-law of said deceased, to the damage of the said plaintiff of five thousand dollars, to wit, at Detroit aforesaid:

For that whereas heretofore, to wit, on or about 30th day of October, A. D. 1882, the said Orson Tuttle was employed at work for the said defendant in the "Detroit, Grand Haven and Milwaukee yards," in the city of Detroit, in the county of Wayne aforsaid, and while there employed at the time aforesaid received orders from the said defendant to couple some cars which were standing on a certain track known as or called "boot-jack siding," and in accordance with the order and request of the said defendant the said Orson Tuttle proceeded to couple the said cars, viz., a car owned by the said defendants and a car owned by the "Wabash and Erie Dispatch," to wit, at Detroit aforesaid;

And whereas the said cars, being both built after the same fashion, were so constructed that in coupling the "draw-heads" are intended to meet and receive the concussion of the cars and keep them apart, and, in case the "draw-heads" fail to meet and pass each other, there is nothing, no means, no machiney nor appliance of any kind on either of said cars to keep them apart and prevent accident by lessening the hazard in coupling, to wit, at Detroit aforesaid;

And whereas it was the duty of the said defendant in the con-

struction of its said car to select such means and appliances as would expose its said servant in conducting its business to as little peril and danger as possible, to wit, at Detroit aforesaid;

And whereas the said defendant, in the construction of its said car, well knowing of the danger occasioned by "draw-heads" failing to meet and passing each other in cars so constructed, and of the likelihood of such failure, especially on curve tracks like "bootjack siding," so negligently and unskillfully constructed its aforesaid car without any bumpers or other means or appliances that while the said Orson Tuttle was in the act of endeavoring to couple said cars as aforesaid the "draw-heads" failed to meet and passed each other, allowing the said cars to go so close together that the said Orson Tuttle was crushed to death thereby while in the exercise of due and reasonable care, and without fault or negligence on his part, through the negligence and want of care and dilligence and skill on the part of the said defendant, to wit, at Detroit aforesaid;

And whereas the said defendant, disregarding its duty to protect the life of its said employé, neglected in the construction of its said car to adopt a long-known device termed a double "dead-wood," which would have kept said cars from going together as aforesaid, and whereby the said Orson Tuttle's life would have been saved in attempting to couple the said cars at the time and place aforesaid:

8 By reason of the premises an action hath accrued to the said plaintiff as such administratrix for the benefit of said Lizzie Tuttle, widow of said deceased, and Bertha Viola Tuttle and Mandena Tuttle, the children and heirs-at-law of said deceased, to the damage of the said plaintiff of five thousand dollars, to wit, at Detroit aforesaid:

For that whereas heretofore, to wit, on or about the 30th day October, A. D. 1882, the said Orson Tuttle was working for the said defendant in the "Detroit, Grand Haven and Milwaukee yards," in the city of Detroit, in the county of Wayne aforesaid, and while there employed he was ordered by the said defendant to couple certain cars which were standing on a certain track known as "bootjack siding," viz., a car belonging to the said defendant, and a car belonging to the "Wabash and Erie Dispatch," to wit, at Detroit, aforesaid;

And whereas the said Orson Tuttle, in obedience to the command and order of the said defendant, proceeded to couple the said cars at the time and place aforesaid, and while attempting to couple the said cars and on making the third and last attempt he, the said Orson Tuttle, was killed by being crushed to death while in the exercise of due and reasonable care, and without fault or negligence on his part, through the negligence and want of care or skill of the said defendant hereinafter alleged, to wit, at Detroit aforesaid;

And whereas the said defendant, well knowing the style and construction of the said cars, and knowing that the "draw-heads" of said cars were the only devices to receive the concussion of and keep the said cars apart in coupling, disregarding its duty to protect the life and limbs of its said employé so negligently and unskillfully

constructed the said "boot-jack siding" containing so sharp a curve that the "draw-heads" of said cars were thrown so much out of line that they, said "draw-heads," failed to meet and passed each other, allowing the said cars to go so close together that the said Orson Tuttle was crushed to death thereby while in the act of coupling or attempting to couple the cars in compliance with the order [of] said defendant as aforesaid, and while in the exercise of due and reasonable care, and without fault or negligence on his part, through the negligence and want of care or skill on the part of the said defendant, as hereinbefore alleged, to wit, at Detroit aforesaid:

By reason of the premises an action hath accrued to the said plaintiff as such administratrix for the benefit of said Lizzie Tuttle, widow of said deceased, and Bertha Viola Tuttle and Mandena Tuttle, the children and heirs-at-law of said deceased, to the damage of the said plaintiff of five thousand dollars, to wit, at Detroit aforesaid, to the damage of the said plaintiff of five thousand dollars; and therefore she brings suit, &c.

By OSCAR M. SPRINGER,
Her Attorney.

9 To the within-named defendant:

Take notice that on filing a declaration in this cause, of which the within is a copy, a rule was entered in the book of common rules kept by the clerk of the circuit court of the United States at his office in the city of Detroit requiring you to plead to said declaration within twenty days after service of a copy thereof and notice of said rule or judgment, etc.

Yours, etc., OSCAR M. SPRINGER,
Plaintiff's Att'y.

Dated at Detroit this 12th day of December, A. D. 1882.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 12th day of December, A. D. 1882, I served the annexed narr. on the Detroit Grand Haven and Milwaukee Railway Company, the defendant therein named, by delivering to James H. Muir, secretary of said railroad company, at Detroit, in said district, a true copy thereof, together with a true copy of the notice to appear and plead endorsed thereon as is endorsed on the narr. hereto annexed.

Fees, $2.00.

S. S. MATHEWS, *Marshal,*
By C. P. TAYLOR, *Deputy.*

Filed in clerk's office December 12th, 1882.
WALTER S. HARSHA.

Endorsed: No. 6835. In the circuit court of the United States for the eastern district of Michigan. Lizzie Tuttle, administratrix, *vs.* The Detroit, Grand Haven and Milwaukee Railway Company. Declaration. Filed in clerk's office Dec. 12th, 1882. Walter S. Harsha, clerk.

10 The Circuit Court of the United States for the Eastern District of Michigan.

LIZZIE TUTTLE, Administratrix, &c.,
vs.
THE DETROIT, GRAND HAVEN AND MILWAUKEE R. R. Co.

The plaintiff in the above-entitled cause being a poor woman and utterly unable to give the security for costs required by rule 4 of said court, the filing of said security by said plaintiff is hereby waived.

GEO. JEROME,
Att'y for Def't.

Endorsed: No. 6835. The circuit court of the United States for the eastern district of Michigan. Lizzie Tuttle, adm'x, *vs.* The Detroit, Grand Haven and Milwaukee Railway Company. Filed in clerk's office Dec. 12, 1882. Walter S. Harsha, clerk.

11 In the Circuit Court of the United States, Eastern Dist. of Michigan.

THE DETROIT, GRAND HAVEN and MILWAUKEE RAILWAY COMPANY
ads.
LIZZIE TUTTLE.

Now comes the said defendant, the Detroit, Grand Haven and Milwaukee Railway Company, by Geo. Jerome, its attorney, and demands a trial of the matters set forth in the declaration of the said plaintiff.

Dated Jan'y 5th, 1883.

GEO. JEROME,
Att'y for Def't.

Endorsed: No. 6835. U. S. circuit court, eastern dist. of Mich. Lizzie Tuttle *vs.* The Detroit, Grand Haven and Milwaukee R'y Co. Plea filed in clerk's office Jan. 5th, 1883. Walter S. Harsha, clerk.

12 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Friday, the twenty-second day of June, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,
vs.
THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely: F. C. Voorhees, Eugene Sullivan, William Colerick, Martin Ryan, Benjamin D. Loomis, Charles Stewart, Louis L. Beaubien, Henry May-

bury, James Parshall, Daniel W. Green, John McPherson, and Edgar Howard, good and lawful men, who are duly impaneled, tried, and sworn well and truly to try the issue between the parties, and sit together and hear a portion of the evidence in the case.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Saturday, the twenty-third day of June, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear the conclusion of the evidence in the case.

13 In the Circuit Court of the United States for the Eastern District of Michigan.

UNITED STATES OF AMERICA, *Eastern District of Michigan*, } *ss:*

Lizzie Tuttle, a resident of Garrett, in the county of De Kalb, in the State of Indiana, widow of Orson Tuttle, deceased, and administratrix of his estate, and who is a citizen of the State of Indiana, plaintiff herein, by Oscar M. Springer, her attorney, complains of the Detroit, Grand Haven and Milwaukee Railway Company, a corporation organized and existing under the laws of the State of Michigan, and who is a citizen of the State of Michigan, defendant herein in a plea of trespass on the case, filing this, her declaration, as commencement of suit:

For that whereas heretofore, to wit, on or about the 30th day of October, A. D. 1882, the said Orson Tuttle was in the employ of the said defendant in the city of Detroit and county of Wayne aforesaid and working for the said defendant at the "Detroit, Grand Haven and Milwaukee yards," and in the course of his ordinary employment he was ordered by the said defendant to couple some cars which were standing on a certain track known as or called "boot-jack siding." The said siding is a double-curve track containing a very sharp curve. The said Orson Tuttle, in compliance with the order and request of the said defendant, proceeded to couple certain cars on said siding, which were near a certain boat-slip, viz., a car belonging to the said defendant and a car belonging to the Wabash and Erie Dispatch, and while the said Orson Tuttle was thus employed and in the act of or endeavoring to couple said cars the "draw-heads" of said cars failed to meet and passed each other, allowing the said cars to come so close together that he, the said Orson Tuttle, was crushed to death thereby. The said Orson Tuttle

had made two attempts to couple the said cars on the said siding in compliance with the said defendant's command prior and just before making the fatal and last attempt, and, not succeeding, he then attempted to place the coupling thereto of said cars upon the draw-heads of said cars for the purpose of making the desired coupling, when, having given the signal to back, in order to make said coupling, the draw-heads of said cars failed to meet and passed each other, allowing said cars to come so close together that the said Orson Tuttle was crushed to death, as aforesaid, while in the exercise of due and reasonable care and without fault or negligence on his part, through the negligence, want of care or skill, of said defendant hereinafter set forth. There were no bumpers nor other device on either of the said cars to prevent them from going together, as aforesaid, in case said draw-heads failed to meet and passed each other as aforesaid. The only device or invention on said cars for the purpose of keeping them apart and to receive the concussion in coupling was the draw-heads aforesaid, to wit, at Detroit aforesaid;

And whereas the said defendant, in the construction of its said cars, not regarding its duty to protect the life of its said employé, neglected to adopt a long-known device called a double dead-wood, which would have prevented said cars from going so close together, and whereby the said Orson Tuttle's life would have been
14 saved, under the circumstances hereinbefore set forth, to wit, at Detroit aforesaid;

And whereas the said defendant, disregarding its duty, neglected, in the construction of its said car, to provide any means to prevent injuring its said employee in case the draw-heads of its cars so constructed should fail to meet or pass each other under like circumstances hereinbefore set forth, to wit, at Detroit aforesaid;

And whereas the said defendant, in the construction of its said "boot-jack siding," so called, negligently and unskillfully constructed the same with so sharp a curve that the draw-heads of the said cars failed to meet and passed each other, thereby causing the death of the said Orson Tuttle as and while in the act of coupling or endeavoring to couple said cars as aforesaid, to wit, at Detroit aforesaid:

By reason of the premises an action hath accrued to the said plaintiff as such administratrix for the benefit of said Lizzie Tuttle, widow of said deceased, and Bertha Viola Tuttle and Mandena Tuttle, the children and heirs-at-law of said deceasad, to the damage of said plaintiff of ten thousand dollars, to wit, at Detroit aforesaid:

For that whereas heretofore, to wit, on or about the 30th day of October, A. D. 1882, the said Orson Tuttle was employed at work for the said defendant in the "Detroit, Grand Haven and Milwaukee yards" in the city of Detroit, in the county of Wayne aforesaid, and while then employed at the time aforesaid received orders from the said defendant to couple some cars which were standing on a certain track known as or called "boot-jack siding," and in accordance with the order and request of the said defendant the said Orson Tuttle proceeded to couple the said cars, viz., a car owned by

the said defendant and a car owned by the Wabash & Erie Dispatch, to wit, at Detroit aforesaid;

And whereas it was the duty of the said defendant, in the construction of its said car, to select such means and appliances as would expose its said servants in conducting its business to as little peril and danger as possible, to wit, at Detroit aforesaid;

And whereas the said defendant, in the construction of its said car, well knowing of the danger occasioned by draw-heads failing to meet and passing each other in cars so constructed, and of the likelihood of such failure, especially on curved tracks like "boot-jack siding," so negligently and unskillfully constructed its aforesaid car without any bumpers [or] other means or appliances that while the said Orson Tuttle was in the act or endeavoring to couple the said cars as aforesaid the draw-heads failed to meet and passed each other, allowing the said cars to come so close together that the said Orson Tuttle was crushed to death thereby while in the exercise of due and reasonable care, and without fault or negligence on his part, and through the negligence and want of care and skill on the part of the said defendant, to wit, at Detroit aforesaid:

And whereas the said defendant, disregarding its duty to protect the life of its said employé, neglected, in the construction [of] its said car, to adopt a long-known device termed a double dead-wood, which would have kept said cars from going together as aforesaid, and thereby the said Orson Tuttle's life would have been saved in attempting to couple the said cars at the time and place aforesaid:

By reason of the premises an action hath accrued to the said plaintiff as such administratrix for the benefit of said Lizzie Tuttle, widow of said deceased, and Bertha Viola Tuttle and Mandena Tuttle, the children and heirs-at-law of said deceased, to the damage of said plaintiff of ten thousand dollars, to wit, at Detroit aforesaid;

For that whereas heretofore, to wit, on or about the 30th day of October, A. D. 1882, the said Orson Tuttle was working for the said defendant in the "Detroit, Grand Haven and Milwaukee yards," in the city of Detroit, in the county of Wayne aforesaid, and while there employed he was ordered by the said defendant to couple certain cars which were standing on a certain track known as "boot-jack siding," viz., a car belonging to said defendant and a car belonging to the Wabash & Erie Dispatch, to wit, at Detroit aforesaid;

And whereas the said Orson Tuttle, in obedience to the command and order of the said defendant, proceeded to couple said cars, at the time and place aforesaid, and while attempting to couple the said cars, and on making the third and last attempt the said Orson Tuttle was killed by being crushed to death while in the exercise of due and reasonable care, and without fault or negligence on his part, through the negligence and want of care or skill of the said defendant hereinafter alleged, to wit, at Detroit aforesaid;

And whereas the said defendant, well knowing the style and construction of the said cars, and knowing that the draw-heads of said cars were the only devices to receive the concussion of and keep the said cars apart in coupling, disregarding its duty to protect the life

and limbs of its said employee, so negligently and unskillfully constructed the said "boot-jack siding" containing so sharp a curve that the draw-heads of said cars were thrown so much out of line that they, said "draw-heads," failed to meet and passed each other, allowing the cars to go so close together that the said Orson Tuttle was crushed to death thereby while in the act of coupling or attempting to couple the said cars, in compliance with the order of the said defendant as aforesaid, at the time and place aforesaid, and while in the exercise of due and reasonable care, and without fault or negligence on his part, through the negligence and want of care or skill on the part of the said defendant, as hereinbefore alleged, to wit, at Detroit aforesaid:

By reason of the premises an action hath accrued to the said plaintiff, as such administratrix, for the benefit of said Lizzie Tuttle, widow of said deceased, and Bertha Viola Tuttle and Mandena Tuttle, the children and heirs-at-law of said deceased, to the damage of said plaintiff of ten thousand dollars, to wit, at Detroit aforesaid;

To the damage of the said plaintiff of ten thousand dollars, and therefore she brings suit, &c., by—

OSCAR M. SPRINGER,
Her Attorney.

Endorsed: No. 6835. Eastern district of Michigan. United States circuit court. Lizze Tuttle, Adm'x, *vs.* The Detroit, Grand Haven and Milwaukee Railway Company. Amended narr. Filed June 22nd, 1883. In open court by leave of court. Jno. Graves, dep. clerk.

16 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Monday, the twenty-fifth day of June, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

This cause again coming on, and jurors Colerick and Stewart being absent, parties consent to proceed with the remaining ten jurors, who sit together and, under the instructions of the court, without leaving their seats, say, upon their oath, that the said defendant is not guilty of the premises in the plaintiff's declaration in this cause laid to its charge in manner and form as the said plaintiff hath therein alleged

17 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on

Thursday, the twenty-eighth day of June, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY CO.

In this cause an order was granted by the court on the 22nd day of June, 1883, allowing the plaintiff to increase the *ad damnum* of her declaration to ten thousand dollars, and in pursuance of which order the plaintiff did file in open court an amended declaration so increasing the *ad dàmnum;* and whereas by inadvertence no entry of said order was made by the clerk on the journal of the court, therefore, on motion of O. M. Springer, att'y for the plaintiff, it is ordered that the plaintiff be allowed to increase the *ad damnum* of her declaration to ten thousand dollars, and that this order be entered *nunc pro tunc* as of the 22nd day of June, 1883, and the filing of said amended declaration so increasing the *ad damnum* is hereby confirmed.

18 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

And now comes the said plaintiff, by O. M. Springer, her attorney, and moves the court to vacate and set aside the verdict heretofore rendered in this cause, and to grant a new trial for the following reasons, viz:

1. The newly discovered evidence of John C. McArthur in connection with the testimony taken on the trial shows that Orson Tuttle was not guilty of contributory negligence, and that the case should have been submitted to the jury.

2. The court erred in directing the jury to find a verdict for the defendant.

3. Under the evidence the plaintiff was entitled to a verdict.

This motion is based on the files and record in this case and the testimony taken and the proceeding had on the trial, and on the affidavit of John C. McArthur and Oscar M. Springer, herewith filed and served.

DETROIT, *July* 13, 1883.

To George Jerome, att'y for said defendant.

SIR: Please take notice that the above and foregoing is a true copy of a motion this day entered in the above-entitled cause.

Said motion will be brought on for hearing on the 20th day of

August, 1883, at the opening of court, or as soon thereafter as counsel can be heard.

Detroit, July 13, 1883.

OSCAR M. SPRINGER,
Att'y for Plaintiff.

Endorsed: No. 6835. United States circuit court, east. dist. Mich. Lizzie Tuttle, adm'x, *vs.* The Detroit, Grand Haven and Milwaukee R'y Co. Motion for a new trial. Filed in clerk's office, July 13, 1883. Walter S. Harsha, clerk.

19 In the Circuit Court of the United States for the Eastern District of Michigan.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,

vs

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, }

John C. McArthur, being duly sworn, deposes and says that he is a resident of the city of Detroit and a member of the metropolitan police force of said city; that in October, 1882, he was in the employ of the Detroit, Grand Haven and Milwaukee Railway Company as the assistant yard clerk in the yard of said company, in the city of Detroit; that he was in said yard when Orson Tuttle was killed, on or about the 21st day of October, 1882, and that he saw said Tuttle killed; that Tuttle was engaged making a coupling on the siding running to a boat-slip in said yard, and which siding is sometimes called "boot-jack siding;" that said Tuttle was working on the inside of the curve, and this deponent saw him signal the engineer, by making motions with his hands and arms, to slack back, and, as the train slacked back, saw him step between the cars to make the coupling, when the draw-bars passed each other and Tuttle was crushed between the cars and killed; that the engine was between Tuttle and the shed or building known as the repair-house, and that there was no pile of stones or anything in the way to obstruct or which did obstruct the view between Tuttle and the engine; that this deponent was beyond the repair-house, but was coming towards it and could and did see between the repair-house and the siding to the point where Tuttle was working; that this deponent saw Tuttle signal the engineer to slack back, by making motions as aforesaid, and knows that the signal to slack back was not passed to the engineer or fireman by any person on the other side of the train.

J. CHARLES McARTHUR.

Subscribed and sworn to before me this 12th day of July, 1883.

SAM'L T. DOUGLASS,
Notary Public, Wayne Co., Mich.

20 In the Circuit Court of the United States for the Eastern District of Michigan.

LIZZIE TUTTLE, Administratrix of the Estate of Orson Tuttle, Deceased,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

UNITED STATES OF AMERICA, *Eastern District of Michigan,* } *ss:*

Oscar M. Springer, being duly sworn, deposes and says that he is the attorney for the plaintiff in this cause and had charge of the preparation and trial of the case; that the plaintiff resides in Indiana, and has had no personal knowledge of the witnesses in the case, the work of looking up the testimony having been committed wholly to this deponent; that at the time the case was tried this deponent had no knowledge of the fact that John C. McArthur, of Detroit, saw Orson Tuttle killed, and had no reason to believe that any one except the men working with Tuttle knew of the accident; that on the 10th day of July, 1882, this deponent learned for the first time that said John C. McArthur could give material testimony in favor of the plaintiff in this cause, and thereupon this deponent procured an affidavit from said John C. McArthur setting forth the substance of the testimony he can give in this cause in case a new trial is granted, and said affidavit is hereto annexed.

OSCAR M. SPRINGER.

Subscribed and sworn to before [me] this 12th day of July, 1883.

GEO. GARTNER,
Notary Public, Wayne Co., Michigan.

Endorsed: No. 6835. U. S. circuit court. Lizzie Tuttle, administratrix, *vs.* The Detroit, Grand Haven and Milwaukee Railway Co. Affidavit of J. C. McArthur & Oscar M. Springer. Filed in clerk's office July 13, 1883. Walter S. Harsha, clerk.

21 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Tuesday, the eighteenth day of September, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

LIZZIE TUTTLE, Adm'x., &c.,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

In this cause a motion by plaintiff for a new trial having been heretofore duly argued and submitted, after mature deliberation thereon, is by the court now here denied.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment

at the district court room, in the city of Detroit, on Thursday, the twenty-seventh day of September, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

LIZZIE TUTTLE, Administratrix of Estate of Orson Tuttle, Deceased,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

The jury by whom the issue in this cause was tried having rendered a verdict therein in favor of the *plaintiff* defendant and against the plaintiff, now, on motion of F. A. Baker, of counsel for the plaintiff, it is by the court now here considered that the said plaintiff take nothing by her suit, and that the said defendant do go thereof without day; and it is further considered that the said defendant do recover of the said plaintiff its costs and charges by it about its defense in this behalf expended, to be taxed, and that said defendant have execution therefor.

22 In the Circuit Court of the United States for the East. Dist. of Mich.

LIZZIE TUTTLE, Adm'x of the Estate of Orson Tuttle, Deceased,

v.

THE DETROIT, GRAND HAVEN & MILWAUKEE R'Y CO.

UNITED STATES OF AMERICA:

The issue joined in this cause came on for trial before the Hon. Henry B. Brown, district judge, and a jury, and thereupon the plaintiff, to maintain said issue on her part, introduced the following testimony:

JAMES KEITH sworn on behalf of the plaintiff.

Examined by Mr. SPRINGER:

Q. What is your business?

A. Railroading and yard work.

Q. You are a railroad man, are you not?

A. Yes, sir.

Q. In what capacity are you employed now?

A. As yardmaster of the Detroit, Grand Haven & Milwaukee R. R.

Q. That is the defendant in this case?

A. Yes, sir.

Q. Do you remember Orson Tuttle, the man that was killed down there in the yard?

A. I do.

Q. Whereabouts was he killed in the yard?

A. It was right by the corner of that slip; on that slip called the "boot-jack," on the inside of the curve.

Q. About how far would that be from the dock?

23 A. Which dock do you mean?

Q. From the river dock.

A. I could not say; the length of two or three or four cars; between three or four cars, I guess.

Q. You never measured it, did you?

A. I never measured it.

Q. Will you please state to the jury how the accident occurred and how the draw-heads passed each other?

COURT: Did you see it?

A. I did.

(Witness continues:) The first thing after dinner we went into the track for to get out, as near as I can remember, the sixth or seventh car, and I stopped as the engine went along. I was engaged and they slacked ahead once. At that time I got off, and they slacked back and he hollered. I had another helper besides him. I could not see him. They slacked ahead and slacked back again.

Q. That was the second time?

A. That was the second time.

Q. He was on the inside of the curve?

A. I could not say where this was. I got up fornent him and stood up against the spile, and he said, Slack him ahead again, and I gave the signal to the other helper and he gave it to the fireman.

Q. Never mind that. Tell how the draw-heads passed each other.

A. I told him the links were too short, and he took it out, and he put it up in this way on top of the draw-bar, making what we call a coupling over the top. He didn't get the pin in and
24 the draw-bars went together.

Q. He was crushed to death?

A. Yes, sir; he tried to get out and the two corners of the car catched him; he had got about part of him out; he had not got out far enough to save his life.

Q. How long did he live after he was caught between the cars?

A. I could not say exactly; I called the helper down and I left him in charge of him and went after the doctor.

Q. He died within an hour, didn't he?

A. I don't think it was an hour.

Q. During that time he didn't say anything to you; didn't make any remarks about how the accident occurred—anything of that kind?

A. I could not say; I was not with him more than about ten minutes at that time; I called one of the men and then went for the doctor; I had to go up for the doctor, and I was not there more than 10 or 15 minutes with him; I could not say what he did say.

Q. How many cars were there on that engine between Tuttle and the car he was coupling?

A. I think it was 6, but I did not count them; it was a long time since and I didn't notice.

Q. How many cars were there the other way?

A. I don't think more than two or three; I don't think there was over three anyhow.

Q. Those cars that were down at the side of the slip, were they coupled together—the two cars below that?

25 A. I could not say.

Q. What were you trying to do?

A. I was trying to take out a D. & M. star car that was there.

COURT: This car you were coupling was not the last one in the train?

A. No, sir; there was two or three cars behind it.

Mr. SPRINGER: That was the car you were trying to get?

A. The one he was killed at we were trying to get.

Q That was a D. & M. car?

A. A D. & M. car.

Q. What kind of a car was the other one he was trying to hitch onto with it?

A. As near as I can remember it was an Erie & Wabash Dispatch.

Q. Were there any dead-woods on those cars?

A. Yes, sir.

Q. What kind of a dead-wood?

A. Double dead-wood; I could not say; there might have been on the Wabash and Erie; I could not swear; there was none on the D. & M. except the regular dead-wood over the draw-bar.

Q. Was there anything defective in the construction of those cars?

A. I didn't examine them.

Q. You looked at them after the accident, and you didn't see anything defective about them, did you?

A. No; I helped the man out.

Q. Were they out of repair?

26 A. I could not say anything about that; I could not say they were; at least I don't remember anything about them.

Q. What day was this?

A. I could not tell you.

Mr. MEDDAUGH: There is no controversy about that.

A. It was after dinner; I should say it was about 1 o'clock.

Q. Last fall, or when?

A. Yes, sir; last fall.

Q. In October, was it not?

A. Somewhere along there.

Q. How long had the man been working there in the yard?

A. About a week or so.

Q. Who had charge of this train?

A. I had charge of the train.

Q. What is your position in the yard?

A. Now?

Q. Yes.

A. What you would call a yard man.

Q. You had charge of the train, did you?

A. Charge of the train and two helpers.

Q. Was Tuttle a helper?

A. Yes, sir.
Q. Who was the other helper?
A. I believe his name was Tom McDermott.
Q. Who was in the engine, do you know?
27 A. Well, Mr. Stevens was the engineer, and the fireman's first name is Harry—he is there—I don't know what his second name is.
Q. So you had five men in all on that train to work?
A. Yes, sir.

COURT: How long had you known this man Tuttle?
A About 6 or 8 days; since he was in the yard.

Cross-examined by Mr. RUSSELL:

Q. How long have you been employed in work similar to this as a railroad man?
A. 12 or 13 years there; I could not say; it must be going on 13; I think it is 13 in the fall.
Q. From your experience in that class of work, is it at all difficult to tell whether one of your helpers has had experience or whether he is a green man?

Objected to as improper cross-examination. Objection overruled.

A. No, sir.
Q. From that knowledge are you able to state whether this man Tuttle had experience in that kind of work or not?

Objected to as an incompetent way of proving whether a man is inexperienced or not. Objection overruled. Exception for plaintiff.

A. There is not any difficulty about telling whether a man is experienced in railroading or not when you see him work.
Q. In what manner did this man perform his work—as an
28 experienced man or as a raw hand?

Objected to. Objection overruled.

A. Well, he took a chance in making that coupling in that way.

COURT: That is not the question. The question is your judgment as to his experience from what you saw of him in the week he was there; what is your idea?
A. I considered him a good man to couple cars—a good, careful coupler.
Q. Was he a good man beyond any question?
A. Yes, sir; he was an experienced man in my opinion.
Q. At the time of this last coupling—at the time Tuttle was caught—just describe your position where you were standing and how you know you were standing at this particular point (handing a diagram to the witness). I will change that question a little. State whether right at the point of that dock there is an upright spile standing about three or four feet high.
A. There is a spile standing about three feet and a half to 4 feet high about there (pointing to the chart).

Q. Does it stand by the slip?
A. It stands right by the corner of the slip.
Q. Where were you standing with reference to that spile?
A. I was standing with my arm leaning on it in that way (illustrating), leaning against the spile
Q. Where was Tuttle at the time you were standing there?
29 A. He was standing directly opposite me, as near as I can say just now.
Q. In full view of you?
A. Yes, sir.
Q. Was not the engine up above the building?
A. Yes, sir; up toward Atwater St.
Q. What can you say as to the possibility of the engineer seeing this man in the position he stood there coupling the cars?
A. I don't think he could see him. I never looked to see if he could or not. I don't think he could.
Q. Why were you there at this point?
A. Because the coupling had been missed twice, and I left the helper standing up here and went down to this place.
Q. Were you not receiving signals at that time from the engineer and transmitting them to your helper?
A. Certainly.
Q. Would these signals have been given through you and your helper if the engineer could have seen Tuttle?
A. No; I didn't consider he could see him on account of that building.
Q. Had there been any other coupling on that siding during the day?
A. I could not say, I am sure. There might have been.
Q. Were you working in that part of the yard that forenoon?
30 A. No.
Q. Do you know whether these men had been working there?
A. No, sir; they were with me all day.
Q. Now there are two switches between that slip-dock, and about the position where that building is on your side of the track?
A. Yes, sir; there is one that goes into the Wabash—that would come in here (indicating on the diagram); then there is one that leads off to the elevator.
Q. Where was your helper standing with reference to those two switches?
A. My helper was standing pretty close to the switch running into the coal-dock—what we call the Wabash switch.
Q. Is that nearest the upper or older slip?
A. To the older slip.
Q. You have had experience in the use of that track, have you not?
A. Yes, sir.
Q. You have frequently made couplings there?
A. Yes, sir.

Q. State whether you have also frequently worked on the transit railway, so called?

A. I have worked on the transit railway off and on; sometimes I was there six or eight months, sometimes ten months.

Q. If you had been making this coupling would you have made it where this man made it?

31 Objected to as immaterial. Objection overruled.

Mr. BAKER: I make the further objection that this witness has already testified that Tuttle was an experienced man. The testimony is incompetent.

Objection overruled. Exception for plaintiff.

Question read.

A. The result would have been that he would not have been hurt—he would not have been killed.

Q. Do you know whether he had a stick or not—was using a stick?

A. Well, I didn't notice any.

Mr. RUSSELL: Would he not have been absolutely safer on the other side of those cars in coupling those cars than if that had been a perfectly straight track?

A. Yes, sir; he would have had more room.

Q. He could not possibly have been hurt?

A. No; it would make no difference what gave way.

Q. Was there anything in the world to prevent his coupling those cars on the other side?

A. No; there was nothing to prevent his standing on that side of the car.

Q. Will you describe the manner in which those draw-bars came together?

A. There is quite a curve there, and they came together and one lapped by the other.

Q. Now one was a large cast-iron draw-head, wasn't it?

32 A. The one on the D. & M. was a flat-faced draw-bar. One of them was flat and the other was round, what we call a gouged draw-bar, the face cut out on each side to save the fingers. The other had a flat face.

COURT: Were the draw-bars of an unusual kind?

A. The common draw-bar used in all cars.

Q. Was there anything unusual about the dead-woods?

A. Nothing; they were the ordinary dead-woods as far as I have seen.

Mr. RUSSELL: Now, the ordinary dead-wood on the D. & M. cars, and such a one as was on this car, is about 6 inches thick and bolted to the outside of the car under which the draw-bar works?

A. I should think it was about 6 inches.

Q. That is called a single dead-wood?

A. Yes, sir.

Q. Then there was something besides the draw-bar to prevent the cars from coming together?

A. There was a dead-wood.

Q. Now, on the Wabash and Erie car, what was there besides the draw-bar there?

A. I could not say what was on that car. She might have had the double bumpers, but I could not say whether she had or not the double dead-woods.

Q. You can say with some certainty that there was a dead-wood of some sort?

33 A. Yes, sir; but whether a double or a single dead-wood I could not say.

Q. Is it not a fact that even when those draw-bars pass each other there was still a space of 12 or 14 inches between the cars next to the coupler?

A. He would not have been killed if he had stood close up to the draw-bars on the curve side; it would have squeezed him.

COURT: You mean close up to the dead-wood?

A. Yes, sir.

Q. Between the dead-wood and the corner of the car?

A. Yes, sir.

Q. He was killed in attempting to jump out?

A. He was killed by the corner of the car.

Q. Is it an unusual circumstance for draw-heads to slip by each other in coupling?

A. It is not.

COURT: Had he been working on that side of the train all the time?

A. I could not say how he tried the first two couplings; I was not there.

Q. Was it possible for him to have gone to the other side of the train?

A. Yes; when they slacked ahead 4 or 5 or 6 feet ahead. Every time they slacked ahead he could have crossed if he had wanted to in that space.

34 Mr. RUSSELL: Is it not a fact that all the work would all be done on the other side of the train there on account of the way in which the track was?

Objected to as argumentative. Question withdrawn.

Mr. MEDDAUGH: You speak of this man having made other couplings—having attempted other couplings on this track. Had he made others before this?

A. I could not say.

Q. You don't know whether he had made other couplings on that track?

A. No; I do not.

Q. This was the first one he had attempted?

A. Yes, sir; that was the first.

Redirect [by] Mr. BAKER:

Q. How long had he been employed in that yard?
A. Not long; 6 or 8 days:

Recross:

Mr. MEDDAUGH: I desire to ask one question further. I am not sure whether it is covered or not.

Q. He had made two attempts to couple this car?
A. Yes, sir.
Q. Where was the third attempt made?
A. Every time they went a little further back.
35 Q. About how far from where he attempted to make the last one did he attempt to make the last one before?
A. It might have been a car length.
Q. The next one was made where?
A. A little further back and so on; depends on how far they came back.

Re-redirect [by] Mr. BAKER:

Q. How long did you work in this yard?
A. 12 or 13 years.
Q. Are you what is called the yard man, the head of the yard?
A. Yes, sir; sometimes; sometimes the yard man.
Q. You had with you this fireman, engineer, and two helpers?
A. Yes, sir.
Q. You gave direction as to what cars should be taken out of the slip?
A. Yes, sir.
Q. You did not couple cars yourself in performing that work?
A. Yes, sir.
Q. You were not attempting to couple this car?
A. No, sir.
Q. You were standing by the post, leaning on it?
A. Yes, sir; I was standing by the post.
Q. And Tuttle was trying to make the coupling?
A. Tuttle was trying to make the coupling.
36 Q. You think there was 6 freight cars between him and the engine?
A. Yes, sir.
Q. About how many rods is it up to this building that stood by the track from the place where he got killed?
A. I could not tell.
Q. Is it about the length of 6 freight-cars?
A. No; not quite 6 freight-cars.
Q. How long is a freight-car, from bumper to bumper?
A. All the way from 28 to 36 feet.
Q. Averaging about 30 feet?
A. That is, from bumper to bumper in the train they will average that.
Q. The cars in that train?

A. I could not say exactly.

Q. But a reasonably fair estimate would be about 30 feet for each car?

A. Yes, sir; about 32 feet.

Q. Had you coupled any other cars on this siding?

A. No.

Q. That is, the engine had backed down with 6 cars?

A. No; the cars were there; he went down with an empty engine.

Q. The empty engine took hold of the train, and your object was to pick out this D. & M. car?

A. Yes, sir; throw it out and put the rest back.

Q. As he attempted to make this coupling he failed upon two different occasions, and that put the car further back upon the siding?

A. It would work it back a little further.

37 Q. About how far back would it go in each attempt?

A. I could not say.

Q. 5 or 6 or 10 feet?

A. I could not tell; it might go back a car length; depends upon when you give the signal to stop.

Q. Depends on how hard the cars would come back?

A. Yes, sir.

Q. When two cars come together like that, if the coupling is not made the cars go apart immediately, do they?

A. Sometimes.

Q. That is, the D. & M. car would settle back from the rest of the train?

A. Depends on the weight behind.

Q. Were there any other cars hitched on the other end of the D. & M. car?

A. There were two or three cars there; I could not say whether it was hitched to them or not; I did not take the car out afterwards.

Q. Were they close together, so they would shove back?

A. They might.

Q. Were you close to him when he made this coupling and failed?

A. I was not.

Q. When he commenced to make the coupling you were up toward the engine?

A. Yes, sir; up that way.

Q. About how near the engine—half-way up?

A. He walked back, and I got off the engine, and I lit my pipe, and I walked along slow.

38 Q. Well, when he commenced?

A. When he commenced I was up where my other helper was.

Q. Then you noticed them slack back twice?

A. Yes, sir.

Q. You know they slacked back, because you saw the motion of the train?

A. No, sir; but he pulled them back.

Q. Did you give any signals when he slacked back on those occasions?

A. I believe I did.

Q. Don't you remember whether he did or not?

A. I think he heard my voice for a signal.

Q. That is what I mean; I don't care how you did it. As you went down toward him he attempted it the third time?

A. No; I got down there and he hollered to me as I got up close to him to slack ahead again, and I done it.

Q. Did you tell him to put the link on top?

A. No; I told him I thought that link was too short and we would have to get a crooked link.

Q. Did you see the link when it was on top of the couplings?

A. I did.

Q. Did you see him step between the cars and couple them?

A. He was between them when he put it on.

Q. Did you see him when the car started back—when he was between or near it?

A. Yes, sir; as he was slacking back he had the link in one hand and the pin in the other, and I gave the signal to slack back.

39 Q. And as the car slacked back——

A. He attempted to get the pin on top into the other draw-bar and didn't get it in.

Q. It is customary to make this kind of a coupling, is it?

A. Yes, sir; if you can't make it any other way.

Q. When the cars are standing upon a straight track it is not usual for draw-heads to slip by, is it?

A. Not often.

Q. They slip by sometimes when one car is higher than another?

A. Yes, sir; they slip by sometimes.

Q. Did these draw-heads slip by, in your judgment, on the two occasions when he attempted to make this coupling—the first two occasions?

Mr. MEDDAUGH: I object. He says he didn't see that.

A. I didn't see that. I could give you my opinion on that.

Q. One very good reason why, in your opinion, they didn't slip by is that Tuttle didn't get killed on those occasions?

A. Well, it helps it.

Mr. MEDDAUGH: Whose testimony is this? My friend Baker, you are leading this witness into saying something he don't mean to say.

Q. A brakeman, in order to couple two freight-cars, at any rate, has to step between the cars, doesn't he, and he has to stay there until the cars come together?

A. Well, most couplers stand with their legs outside the rail and reach in.

40 Q. His body is between the cars; he has to reach in and make the coupling as they come together?

A. No more than your head and shoulders, except a man is pretty short.

Q. If you were making one of these top couplings, maybe, you would not stand in that way?

A. You would have to have your body in partly.

Q. If a man was coupling two freight-cars with these single dead-woods on a straight or curved track, and there was any defect in the draw-heads, or by any accident they should slip by so the cars would come together, you would be crushed, would you not?

A. It would depend on which side of the car he was on.

Q. If he was coupling cars upon a curve the safer place would be on the outside of the curve?

A. Yes, sir.

Q. And as the cars came together there would be a place there in the shape of a "V?"

A. Yes, sir.

Q. If the cars were on a straight track he would be crushed on either side?

A. Well, if they were regular 6-inch dead-woods he would have a foot. It would depend on the bigness of the man if he would be killed; for me I don't think I would be killed.

Q. Now you say you were upon the opposite side from Tuttle, or upon the outside of the curve?

A. I was on the outside of the curve.

41 Q. Giving signals to the engineer through the other helper. Now, could you see the engineer?

A. No, sir.

Q. Where was the other helper?

A. Where the other switch leads into the Wabash, or near there.

Q. On the same side of the track you were?

A. On the same side I was on.

Q. About how was he situated between you and the engine—half-way?

A. He was a little nearer me than to the engine, I should think.

Q. But about half-way?

A. Well, somewhere along there.

Q. Do you mean to testify that when these two unsuccessful couplings were attempted the signals to slack back were given by you?

A. No; the last one as I was going down; the first one he hollered himself.

Q. And the second one he hollered himself?

A. Yes, sir; and I hollered again to slack back.

Q. And then when you come to make the third coupling——

A. I was talking to him.

Q. Did he tell you to slack back?

A. He told me to slack ahead; he got the link fixed to suit him; he told me to slack back, and I did so.

Q. If you had not been there he would have done all the signalling himself on the other side?

42 A. He could not holler loud enough for them to hear him.

Q. The curve was in such a shape he could not see them when they put their heads out of the cab?

A. I don't think so.

Q. The building was not in the way, was it?

A. It was; or at least I have considered it was.

Q. Have you ever looked through there since, before the building was taken down, to see whether he could see the engineer or not?

A. I have never made a note of it either then or since.

Q. It is a usual thing, is it not, among brakemen and couplers to couple on the inside of a curve, is it not.

A. It is not.

Q. Where a brakeman is making a coupling and there is no one to signal, he has to be on that side, hasn't he?

A. Well, there is no train but what there is somebody to give the signal.

Q. Do you mean to say it is an unusual thing for a coupler to be on the inside of a curve?

A. I do, sir.

Q. Did you give Tuttle any directions as to that when he came into the yard?

A. I didn't; I should think I would insult a man to say that to him.

Q. There was at least one experienced man, then, that was used to go on the inside of a curve?

43 A. No, sir; there is no doubt but what plenty of men make couplings on the inside of the curve.

Q. They do it every day?

A. I suppose they do.

Q. Tuttle attempted to make two of them by making signals?

A. Yes, sir; by his voice; they could not see him in my opinion.

Q. Well, never mind your opinion if you don't know; you were not on that side of the train at that time, were you?

A. No, sir.

Q. You don't know whether he could see the enginer or not?

A. No, sir.

Q. So it is merely an expression of opinion on your part?

A. Well, that is an expression of opinion.

Q. Did you couple onto that car after he was killed?

A. I did not; I was taken up with him for about an hour and a half, and the track was shunted before I got back.

Q. How far from this post by which you were standing—how far down to the slip was it from where the accident occurred?

A. From where the post was to where Tuttle got killed it would be something like across there (indicating the space between the end of the railings between the seats next to the aisle where the jury sat to the north side of the court-room.)

Q. It would be towards the river?

A. Yes, sir.

Q. This track terminated at the dock at the end of the slip?

A. It terminated at the river there.

44 Q. At that time did you have any knowledge that the draw-heads would pass each other, although they were in

repair; that the draw-heads would pass each other on this part of the track?

A. Well, I had seen them pass.

Q. At this point?

A. Yes, sir, and on different other points.

Q. I am talking about this point; had you before this time seen draw-heads pass each other on this part of the track?

A. Right on that curve?

Q. Yes.

A. I don't know whether I have or not; I may have and I may not.

Q. Don't you remember seeing draw-heads pass at about the same place where Tuttle was killed?

A. Yes, sir; I have seen draw-heads pass on that track.

Q. And draw-heads that were in good repair?

A. Yes, sir; in good repair, as far as I knew.

Q. And draw-heads that pass each other simply because of the curve of the track?

A. Yes, sir.

Q. About how long before this accident was it that you saw the draw-heads pass?

A. I could not say.

Q. Did you inform Tuttle of the fact that at that place in the track draw-heads would pass?

A. I did not.

Q. Did you inform any one else in the yard of that fact?

A. I did not.

45 Q. And still you were the officer in charge of the yard and men?

A. No; I was in charge of the engine.

Q. You had charge of the two helpers, including Tuttle?

A. Yes, sir.

Q. And you gave directions to the engineer?

A. Yes, sir.

Q. How many other helpers did you have?

A. Those two.

Q. I don't mean upon this occasion, but any other day?

A. Oh, I could not say.

Q. How many worked with you at any given time?

A. For the last two years there has been a crew of five with each pony—two helpers, a yard man, an engineer, and fireman.

Q. How many pony engines in your charge?

A. One then—one that day.

Q. You are not the head yard man, then?

A. No, sir.

Q. But you were in charge of one crew?

A. Yes, sir—that day.

Q. But you take different crews on different days, I suppose?

A. No; I was working days then for a while.

Q. But what you call the yard man—the man who occupies the

position you occupy—would be the superior officer, the officer in command of the crew?

A. In command of all the engines in the yard; what I told you — I was in charge of this engine.

Q. I know. That was one crew. Now, who has command
46 of the engine—the yard man?

A. The yard man.

Q. And you occupied that position at the time of this accident?

A. Yes, sir.

Q. If these draw-heads had not passed would Tuttle have been killed?

A. No; I don't think so. If they had not passed he would not have been killed, in my opinion.

Redirect [by] Mr. MEDDAUGH:

Q. You say you have seen these draw-heads pass at other places in the yard?

A. Yes, sir.

Q. Draw-heads similar to these?

A. Yes, sir; I have seen common draw-heads like them pass in a straight track.

Q. And you have seen them pass with double dead-woods, haven't you, also?

A. Yes, sir.

Q. And where the draw-bars were not out of repair?

A. Yes, sir.

Q. You were coupling cars with these men, were you not? It was a part of your business as much as it was theirs?

A. It was a part of my business as much as it was theirs.

Q. All there was of it some one had to take charge of the work—some one engaged in the same work they were—doing the same work?

47 A. Yes, sir.

Re-recross [by] Mr. BAKER:

Q. You say you have seen these draw-bars pass each other on a straight track?

A. Yes, sir.

Q. That would be where they were out of repair?

A. They didn't seem to be out of repair. I had to put them on a switch to get them apart.

Q. Did you ever see draw-bars that were in good repair that would pass each other on the same level on a straight track?

A. Yes, sir; I have seen draw-bars that looked to be in repair.

Q. They would not be in repair, would they, if they would pass?

A. Well, there was some round-headed draw-bars—the faces round. You take two of them and they will lap.

Q. Were these draw-heads round?

A. One of them was not—the D. & M. car. I don't remember exactly what was on the other.

Q. But where there were two round draw-bars they might go by?
A. They would pass easier.
Q. But one or the other of them would have to be thrown out of position?
A. They would have to be twisted a little.
Q. Now, I show you this diagram—we will call it Exhibit "A"—and I will ask you if that was about the position of those cars
48 at the time Tuttle was killed? (Showing a diagram to the witness.)
A. Well, what is this?
Q. This is not supposed to be an accurate representation of the slip, but an accurate representation of the two cars between which he was crushed. Does that represent their position substantially?
A. Do you mean about the way the draw-bars were when he got squeezed?
Q. Yes, sir.
A. Yes, sir; that is about the way it was.
Q. He got caught right between the two corners, you say?
A. Yes, sir.
Q. How did it catch him?
A. His back and breast; he was trying to step out when he was catched.

Mr. MEDDAUGH: Sidewise?

A. Sidewise.

Mr. BAKER: That was the best way and the only way he could get out then, wasn't it?
A. The speediest way was the best then.

The diagram just shown to the witness was then marked Exhibit "A" and offered in evidence.

Mr. MEDDAUGH: As far as it relates to the position of the track, I object to it.

Mr. BAKER: We don't put it in with reference to the track—just with reference to the two cars.

It was admitted in evidence, & the original thereof is hereto annexed.

49 HENRY E. STEVENS sworn on behalf of the plaintiff.

Q. What is your business?
A. I am an engineer and fireman on the D., G. H. & M.
Q. Were you the engineer in charge of the engine when Tuttle was killed?
A. Yes, sir.
Q. Who was the fireman with you?
A. H. J. Lovett.
Q. Did you handle the engine or your fireman at the time of this accident?
A. I handled it myself.
Q. You had hold of the throttle, or whatever they call it?

Q. Yes, sir.
Q. Whereabouts was the fireman?
A. He was on the left-hand side of the engine, in his place.
Q. What do you call the left-hand side of the engine—facing the front or rear?
A. In the cab on the opposite side from me.
Q. Facing the front, you would be on the right?
A. Certainly.
Q. And he would be on the left?
A. Yes, sir.
Q. Do you remember how many cars you had hold of at the time you attempted to couple this D. & M. car?
A. I am pretty sure I had only 6.
Q. Ordinary freight-cars, I suppose?
A. Yes, sir.
50 Q. Do you remember how many times you slacked back to make this coupling?
A. I think about three times.
Q. Do you remember whether it was three or more?
A. I am sure it would not exceed four.
Q. You would not be positive whether it was three or four?
A. I would be positive it was three, but I would not be positive it was four.
Q. In the third or fourth attempt Tuttle was killed?
A. Yes, sir; he was killed the last time.
Q. When you slacked back the first and second times who gave you the signal, Keith or Tuttle?
A. My fireman.
Q. Do you know from whom he received the signal?
A. I do not.
Q. You received the signals entirely from your fireman?
A. Yes, sir.
Q. Is that a part of his duty there?
A. That is his sole duty.
Q. When he is not throwing in the coal, I suppose?
A. Yes, sir.
Q. How far was it, about, from the edge of the dock—the water-line of the dock—that the accident occurred?
A. I should think about 2 cars.
Q. That would be about 60 feet?
A. It would be about 60 feet.
Q. Is there a post or bumper at the end of this track at the
51 end of the dock?
A. There is.
Q. Were those two cars back against the bumper?
A. I could not say.
Q. But they were nearly there?
A. I could not say as to that. I were not back there.
Q. Were you looking out of the cab at the time this accident occurred?
A. Yes, sir.

Q. Were you looking out to see if you could see Tuttle?
A. Yes, sir.
Q. Could you see him?
A. I could not.
Q. I suppose that is an easy thing to do in an engine, to pull the throttle and look in the other direction at the same time?
A. It is not a easy thing, but when we have to do it we have to.
Q. Did you see him when he attempted to make the two prior couplings?
A. I did not.
Q. Were you looking to see him?
A. I were.
Q. Did he make any signal to you?
A. He did not.
Q. Before he stepped in to make the coupling did he stand outside so you could see him?
A. No, sir.
52 Q. So he was between the two cars all the time?
A. I could not say that, because I could not see him.
Q. Could you see the cars?
A. I could not.
Q. But, nevertheless, you were looking out of the cab to see him if you could?
A. Yes, sir.
Q. Upon all three or four of the occasions?
A. Yes, sir.
Q. And your fireman was looking out on the same side?
A. No, sir.
Q. Which side?
A. On his own side.
Q. So you could not see Keith nor his other helper?
A. No, sir.
Q. Was there anything between the cab and the car that Tuttle was trying to couple that obstructed the view?
A. Yes, sir.
Q. What was it?
A. It was a shanty and a pile of staves.
Q. How close to the track was the shanty?
A. I could not tell you to a foot.
Q. Well, about?
A. It was somewhere, I should think, about 8 or 9 feet—maybe 10 feet—I am not so positive.
Q. Was the pile of staves between the building and track?
A. The pile of staves was between the building and the
53 place where Tuttle was making the coupling, even closer to the track than the building were.
Q. How high was the pile of staves?
A. I should think 6 feet high.
Q. How long had they been there?
A. I could not tell you.
Q. How long had the building been there?

A. I could not tell you that.

Q. Had Tuttle coupled any cars before he attempted this one in making up this train?

A. I don't know as he did; he might have coupled the engine on to the cars, or the other Heler, his partner, might; I don't know which one of them.

Q. So the 6 cars you had hold of were all coupled together?

A. Yes, sir.

Q. And none of them were coupled on this occasion?

A. No, sir.

Q. You found them all coupled when you came there to do this work?

A. Yes, sir.

Q. Did Tuttle ride down with you on the engine?

A. Yes, sir; I think he did.

Q. And when he got off the engine, did he get off and walk down on the same side that he got hurt?

A. I could not tell you that.

Q. You don't remember.

A. No, sir.

No cross-examination.

54 THOMAS CAMPAU sworn on behalf of the plaintiff.

Examined by Mr. BAKER:

Q. Where do you reside?

A. In the city of Detroit.

Q. What is your business?

A. Surveyor and civil engineer.

Q. How long have you been engaged in that business?

A. Since 1849, I think.

Q. Have you made a survey of the side track that is in question in this suit?

A. I have; a part of it.

Q. Called "boot-jack siding?"

A. Yes, sir.

COURT: Do you make any question regarding the correctness of that?

Mr. MEDDAUGH: I don't know what it is; he probably can indentify, which is just as good a way as any.

Q. When did you make this survey?

A. About a month ago, or something like it.

Q. Did you make a diagram of this track starting at the edge of the dock or bumper?

A. I did.

Q. And extending away down into the yard past the building?

A. I did not make any survey past the building.

Q. But down to about the building?

A. I made a survey of about 128 feet from the edge of the dock.

Q. Was this shanty or building there at that time?

55 A. I could not say whether it was or not.

Q. You did not go down as far as the building?

A. No; I didn't notice any building. It might be there.

Q. How does this track start from the edge of the dock—in a straight line or a curve?

A. It starts on a straight line.

Q. About how far does it run in a straight line?

A. About 53 feet and some few inches. I could tell exactly how much if you wish.

Q. That is near enough. Can you give us the radius of the first curve?

A. It lays in a straight line 53 feet and some inches.

Q. Then there is a curve in the track, I suppose; is that so?

A. Yes, sir.

Q. Give us the radius of the first curve if you can.

A. I think I can; about 98 feet ten inches; that is the first 25 feet of the curve.

Q. Does the curve change then?

A. It seems to be changing continually.

Q. What did you find?

A. The next 25 feet I find it corresponds with a radius of 123 feet and 10 inches.

Q. That is the next 25 feet?

A. Yes, sir; and the next 25 feet has a radius of 123 feet 1 inch and a quarter.

Q. Are those all the radii that you took?

56 A. That is all.

Q. Did you measure D. & M. cars down there like those described by the other witnesses?

A. I measured a couple of cars.

Q. Were they D. & M. cars?

A. They were marked so.

Q. Did they have single or double dead-woods on them—those that you measured?

A. Single, I should say.

Q. Dead-woods like those marked there (showing a diagram to witness)?

A. Yes, sir.

Q. Will you state whether upon any portion of this track there is any considerable point or space where the draw-heads of two cars if you attempted to couple them over this space would cross each other?

Objected to.

[Q.] What cars are you talking about?

Mr. BAKER: D. & M. cars.

COURT: Is Mr. Campau an expert?

Q. Could you form such an estimate or tell by measuring the cars standing upon the track whether the curve here was so sharp that the draw-heads would necessarily pass?

A. I could.
Q. You did do it?
A. I did do it.
Q. Can you tell us about what space there is upon this curve, if any, where cars that are in repair, the draw-heads of which
57 would pass if you attempted to couple them upon this space?

Objected to. The witness cannot testify with regard to it. Objected to as incompetent.

Mr. BAKER: We desire to show that the ordinary freight-car, with a draw-bar the Detroit & Milwaukee railway uses, that any brakeman who attempted to couple them upon that 10 or 12 feet of track referred to would be certainly killed; not that he has built railroad cars; not that he is an experienced railroad engineer even, but we simply desire him to testify as an expert in the use of the instrument called the transit, by which he can determine a curve as an expert in making measurements and adjusting these different things to each other; that is, any accomplished draughtsman or civil engineer and surveyor could measure a car as it stands upon the track and measure the curve, and by using the instrument and in making his draught, his measurements, he could tell whether the draw-heads would pass each other or not. We prove as a matter of fact that they did go by, and that it was known to one railroad man in the yard that they went by, and we desire to show that they went by because of the condition of the track.

Objection sustained.

Mr. BAKER: Can I make an enquiry as to the ground of the decision?

COURT: Yes, sir; that it is incompetent and irrelevant.

Mr. BAKER: It is based upon the point made by Mr. Meddaugh, that we have not shown that there are similar curves or the same curves.

58 COURT: I think you have shown that this accident occurred, and it occurred by the slipping of the draw-heads past each other, and that the jury would be authorized to infer that that was the cause of two cars coming nearer together from that. Now, it does not seem to me that any further testimony upon that point is necessary.

Mr. BAKER: I offer to show, if the court please, that the draw-heads passed because of the construction of the track. Is that excluded?

COURT: I think there is plenty of evidence of that now.

Mr. BAKER: I also offer to show by this witness that the cars in common use by the defendant in its yard—the two in question—that the draw-heads will pass upon ten or 12 feet of this track.

COURT: If you propose to extend it to cars in common use I will permit it; but I do not think that any one or two cars would prove it.

Q. Can you tell us how long the cars were that you measured?

A. I can, sir.

Q. Give us the length of them.

A. In the first place, I don't know whether it is proper for me to say what has not been asked in this testimony, but if it is admissible I will say that I saw several cars, and I measured one of those, and it was 33 feet.

Q. Were the sizes of the cars marked upon them?

A. They were marked.

59 Q. You measured one of them?

A. Yes, sir.

Q. What did you find it to be?

A. I found it to be 33 feet 8 inches from outside to outside. It was marked 33 feet inside; there were several of them; I thought measuring one of that class was sufficient.

Q. Did you measure the bumpers—the dead-woods, as they are called—over the draw-bar?

A. I did.

Q. What were their dimensions?

A. The dead-wood was 5 inches thick and 2 feet 2 inches long.

Q. And how deep, or about how high?

A. About a foot; I did not measure the depth.

Q. But they were five inches thick?

A. 5 inches, and 2 feet 2 inches long.

Q. How wide were the cars?

A. This 33-foot car was 8 feet 10 inches wide outside. Now as to another class of car——

Q. Did you measure or observe whether or not the cars that you measured stood square upon the wheels of the car?

A. Yes, sir.

Q. That is, whether the wheels were equally distant from the outside on each side?

A. Yes, sir.

Q. Did you measure the width of the track?

A. Yes, sir; I did.

60 Q. How wide is the track between the rails?

A. 4 feet $\frac{7}{10}\frac{0}{6}$ between the rails.

Q. Did you measure any other kind of car?

A. I did. This car I measured was marked "Wheat" and had a load of wheat in it; I measured another marked "The D., G. H. & M. R'y;" those are the initials.

Q. That is, both cars were marked.

A. Yes, sir—that way.

Q. What were the dimensions of this other car?

A. 28 feet 2 inches and a half from outside to outside; 9 feet 2 inches and a half wide. I measured another one also; that was one shorter than this last one.

Q. How many cars did you observe there of this class?

A. Oh, I should think 6 or 10; quite a number of them.

Q. Did you see any cars there labelled "Wabash and Erie?"

A. Well, I did not observe; I might have seen one, but I don't remember.

Q. So that in making your diagram did you take this first car you measured, its length, 33 feet?
A. I took the average.
Q. What?
A. 30 feet.
Q. What width did you use in making the diagram?
A. 9 feet; that was the average of the two cars.
Q. Did you measure the draw-head?
A. I did.
Q. What kind of draw-heads did you measure?

61 COURT: It seems to me this is not competent.

Mr. BAKER: I will put a witness on the stand to show this was the same kind of a car that caused the accident. I cannot put the whole thing in at once, but I can assure your honor that I do not wish to consume time unnecessarily.

Last question read.

A. Well, I think one of them was square-faced, and another one was kind of beveled—rounded.
Q. Did you take the size of them?
A. I took the size of them; they were 10 inches wide.
Q. You mean one had a square end?
A. Yes, sir.
Q. And the other was beveled a little?
A. Yes, sir; rounded a little on the face.
Q. On the corners?
A. Yes, sir.

Mr. BAKER: Now, if the court please, I can either take Mr. Campau off the stand or proceed with him. I desire to ask him whether, taking the cars that he measured, there was any place in this track where the draw-heads would pass if you attempted to couple them.
Mr. MEDDAUGH: Let it be taken subject to exception.

Q. Will you state what the fact is?
A. Yes, sir; there is a point—or not a point, but a space, if there was any lateral play in the draw-heads; there was a space of about 12 feet that they will pass anyhow; it is inevitable.
Q. Whether there is any play or not?

62 A. If there is any play there will be a longer space where they will pass—lateral play I mean.
Q. Of the draw-heads?
A. Of the draw-heads.
Q. As I understand you, there is 10 and 12 feet that they will pass any way?
A. Yes, sir; inevitably.

Cross-examination [by] Mr. MEDDAUGH:

Q. Where is that?
A. That is near the junction of the curve and the tangent.
Q. About how far from the dock? Can you give the number of feet from the end of the track at the dock at which this occurs?

A. At which the curve commences?

Q. Yes; how many feet from the end of the dock?

A. It is 53 feet and——

Q. From the dock at the end of the track?

A. If you will allow me to refresh my memory—I know it is 53 feet and some odd inches from the end of the dock to the commencement of the curve.

Q. At the beginning of this 12-foot space within which the draw-heads would pass that 12-foot space would commence about how far from the dock?

A. 53 feet and a half (referring to memoranda).

Q. That is where it begins?

A. Yes, sir.

Q. And extends about 12 feet beyond?

63 A. Well, it would go very nearly 12 feet beyond that point where it would pass.

Q. These draw-bars would pass, you say?

A. Yes, sir; inevitably they would pass.

Q. These draw-bars of the kind you have spoken of?

A. Yes, sir; and there are draw-bars which would pass further down—that is, if there is lateral play, and of course there is; we all know there is, but how much I cannot tell; how many inches I don't know.

Q. Then, if I understand you (for that is what I am trying to call your attention to, and what I am trying to hold you to there a minute until we do understand), this 12-foot space which you have been testifying about——

WITNESS (interrupting): I say at least 12.

Q. That is 53 feet from the end of the dock?

A. No; 5 feet less than that.

Q. 47 feet, then; is what you mean?

A. About 48½ feet.

Q. From the dock end of the track that this 12-foot space begins?

A. Yes, sir.

Q. And it continues onward for 12 feet?

A. Yes, sir; that is where they would inevitably pass.

Q. That is within that space?

A. Yes, sir; they might pass beyond that, but that is the conclusion I reached.

Redirect:

Q. Now, you say there is a place where they will pass, com-

64 mencing at about 47 or 48 feet from the end of the track?

A. 48 feet and a half; that is exactly what it is.

Q. Where they will inevitably pass?

A. Yes, sir.

Q. And that they will pass each other beyond that, if there is any play, for some distance?

A. Yes, sir.

Q. And from what you saw of the draw-heads there there would be some play anyhow, would there?

A. Oh, yes.

65 WILLIAM BRAITHWAITE sworn on behalf of the plaintiff.

Examined by Mr. BAKER:

Q. Where do you reside?
A. The city of Detroit.
Q. What is your business?
A. Surveyor and engineer.
Q. Have you had any experience in engineering or surveying upon railroads?
A. Yes, sir; I have had considerable.
Q. Have you ever had any experience in laying curves upon track?
A. No, sir.
Q. Do you know how it is done?
A. Yes, sir; I do know something about it. I have made a great many surveys after tracks have been laid.
Q. Have you knowledge of railroad tracks so you would be able to state whether a track was properly or improperly surveyed and laid as far as the curves were concerned?
A. Well, yes; I could form a good idea.
Q. You say you never laid any of this kind of work?
A. No, sir; I have done considerable surveying in railroads—in fact, have done a good deal.
Q. Are you a graduate in your profession?
A. Yes, sir; in the old country; in Canada.
Q. So this laying of railroad tracks is not a difficult job of engineering—laying curves for trains to run over is not difficult work for an engineer to do, is it?
A. No, sir.

66 Q. Will you state whether a railroad track is properly laid which contains curves so sharp and in such a position with reference to a tangent or a straight line that draw-heads of freight-cars in ordinary use upon the road would pass each other if you attempted to couple them at that point?

Mr. MEDDAUGH: That is objected to. This witness has shown by himself to know no more about it than either you or I.

Objection sustained.

Q. Do you know, as a civil engineer, how a track with reference to that particular ought to be laid?
A. I beg your pardon.
Q. As a civil engineer, as a member of your profession, do you know how a railroad track ought to be laid with reference to the curves in the track?

Objected to. That is asking his opinion of himself.

COURT: Have you made it a business in civil engineering to lay railways?

A. No, sir; I have done a good deal of surveying.

Q. Surveying for the bed?
A. Yes, sir; after they were constructed and before.
Q. Surveying what?
A. Surveying track after it was constructed and making maps of it.

Mr. BAKER: We desire to offer his testimony for the sake of having it upon the record, and we except to its exclusion.
COURT: Yes, sir.

Testimony ruled out. Plaintiff excepts.

67 JAMES KEITH recalled for the plaintiff.

Mr. BAKER:

Q. You heard Mr. Campau's testimony about the cars he measured?
A. I heard a part of it.
Q. Now, you say that one of those cars was a D. & M. car?
A. A star D. & M. car.
Q. Do you know whether it was a star wheat car or not?
A. They are all wheat.
Q. Do they have a flat draw-head or a beveled one?
A. All of them?
Q. Yes.
A. Some of them are flat; some of them are beveled.
Q. Are they marked 33 feet long?
A. All the stars are.
Q. And this was a star?
A. Yes, sir.
Q. And it had a single dead-wood about 5 inches thick over the draw-bar?
A. It has a single dead-wood; I don't remember exactly about the 5 inches.
Q. About two feet long?
A. I think it is about 2 feet long.
Q. Are all the D. & M. cars like that?
A. No; some are short and some are long.
Q. Have they all the same dead-wood?
A. Yes, sir; the same dead-wood.
68 Q. The same kind of a draw-bar?
A. About the same.
Q. Some are longer and some are shorter?
A. No, sir.

COURT: Are there any other curves in the yard as sharp as that?
Mr. BAKER: I object to that.

Exception for plaintiff.

A. I don't know that there are. I think there is one down near the dock that is about like that.
Mr. BAKER: You think there is only one that is shorter?
A. It is not as short as that.

Q. So this is an unusually short, sharp curve?
A. I think it is about as short as any in the yard.
Mr. RUSSELL: Don't you know there are curves on the Transit road that are as sharp as this?

Objected to.

COURT: You mean in the Detroit & Milwaukee yard?
Mr. RUSSELL: Yes, sir; the Transit road is a part of the Milwaukee yard.

A. The Transit road has sharp curves.
Q. And all of that work is done in the night, is it not?
A. All done in the night.
Q. Is it not a fact that a number of cars in the yard marked "D. & M." as a matter of fact are not D. & M. cars, but simply indicate they are run by that company in a particular line?

69 Objected to. Question withdrawn.

Redirect [by] Mr. BAKER:

Q. The Transit road is a road that runs up the river, is it not, along the dock?
A. Yes, sir.
Q. And handles freight-cars in the night?
A. Yes, sir.
Q. And has some very sharp curves?
A. Yes, sir.
Q. Are there any sharp curves where it comes into your yard?
A. No, sir.
Q. Tuttle didn't work on that, did he?
A. On the Transit road?
Q. Yes.
A. No; I don't think so; I am not sure.
Q. The Transit road is simply for the accommodation of the business property up there; is it an ordinary railroad, or is it simply used to handle freight in the night for the accommodation of property up beyond the depot?
A. It is handled just the same as the yard.
Q. It is not used for ordinary railroad business—for passengers?
A. No; it is not used for passengers.
Q. It is used to distribute freight from the depot?
A. Yes, sir.

70 ALVIN HALL sworn for the plaintiff.

Examined by Mr. BAKER:

Q. Where do you live?
A. Detroit.
Q. How long have you lived here?
A. 8 months.
Q. Where did you live before?
A. In the township of Orion, Oakland county.
Q. What is your business?

A. Brakeman on the Michigan Central road.
Q. How long have you been a brakeman?
A. Altogether?
A. Yes.
A. 7 years.
Q. What kind of trains do you brake on?
A. Braking on passenger trains now.
Q. Did you ever brake on a freight train?
A. Yes, sir.
Q. Did you ever couple cars?
A. Yes, sir.
Q. That was a part of your duty as brakeman?
A. It was when I was on freight.
Q. Now, I desire to ask you, in coupling cars upon a curve, which side is the proper side for a brakeman or coupler to stand?
A. On the inside of the curve.

71 Q. Is that usually the side upon which old and experienced brakemen stand; is there any reason why it is customary to go on that side?

A. Yes, sir; on account of the fireman or engineer seeing the signals.
Q. So you can see the fireman and engineer and signal backwards and forwards?
A. Yes, sir.
Q. If you are on the other side you cannot see the signals?
A. It is a very difficult job to see the engineer or fireman.
Q. So that, as I understand you, it is the usual and ordinary thing to be on the inside of the curve?
A. Yes, sir.

No cross-examination.

72 EDMUND BARBER sworn for the plaintiff.

Examined by Mr. BAKER:

Q. Where do you live?
A. 318 Lafayette St. East.
Q. What is your business?
A. I am in the hardware business now. I used to railroad.
Q. How long were you railroading?
A. On and off for the last 13 years.
Q. What did you do on the railroad?
A. Broke.
Q. Brakeman?
A. Yes, sir.
Q. What road did you brake on?
A. The Detroit, Grand Haven & Milwaukee and the Lake Shore.
Q. How many years did you brake on freight trains?
A. On and off for the last 13 years.
Q. Will you inform us in coupling cars upon a curve which is the proper side for a coupler or brakeman to be?
A. On the inside of the curve.

Q. So this is an unusually short, sharp curve?
A. I think it is about as short as any in the yard.
Mr. RUSSELL: Don't you know there are curves on the Transit road that are as sharp as this?

Objected to.

COURT: You mean in the Detroit & Milwaukee yard?
Mr. RUSSELL: Yes, sir; the Transit road is a part of the Milwaukee yard.

A. The Transit road has sharp curves.
Q. And all of that work is done in the night, is it not?
A. All done in the night.
Q. Is it not a fact that a number of cars in the yard marked "D. & M." as a matter of fact are not D. & M. cars, but simply indicate they are run by that company in a particular line?

69 Objected to. Question withdrawn.

Redirect [by] Mr. BAKER:

Q. The Transit road is a road that runs up the river, is it not, along the dock?
A. Yes, sir.
Q. And handles freight-cars in the night?
A. Yes, sir.
Q. And has some very sharp curves?
A. Yes, sir.
Q. Are there any sharp curves where it comes into your yard?
A. No, sir.
Q. Tuttle didn't work on that, did he?
A. On the Transit road?
Q. Yes.
A. No; I don't think so; I am not sure.
Q. The Transit road is simply for the accommodation of the business property up there; is it an ordinary railroad or is it simply used to handle freight in the night for the accommodation of property up beyond the depot?
A. It is handled just the same as the yard.
Q. It is not used for ordinary railroad business—for passengers?
A. No; it is not used for passengers.
Q. It is used to distribute freight from the depot?
A. Yes, sir.

70 ALVIN HALL sworn for the plaintiff.

Examined by Mr. BAKER:

Q. Where do you live?
A. Detroit.
Q. How long have you lived here?
A. 8 months.
Q. Where did you live before?
A. In the township of Orion, Oakland county.
Q. What is your business?

A. Brakeman on the Michigan Central road.
Q. How long have you been a brakeman?
A. Altogether?
A. Yes.
A. 7 years.
Q. What kind of trains do you brake on?
A. Braking on passenger trains now.
Q. Did you ever brake on a freight train?
A. Yes, sir.
Q. Did you ever couple cars?
A. Yes, sir.
Q. That was a part of your duty as brakeman?
A. It was when I was on freight.
Q. Now, I desire to ask you, in coupling cars upon a curve, which side is the proper side for a brakeman or coupler to stand?
A. On the inside of the curve.

71 Q. Is that usually the side upon which old and experienced brakemen stand; is there any reason why it is customary to go on that side?

A. Yes, sir; on account of the fireman or engineer seeing the signals.
Q. So you can see the fireman and engineer and signal backwards and forwards?
A. Yes, sir.
Q. If you are on the other side you cannot see the signals?
A. It is a very difficult job to see the engineer or fireman.
Q. So that, as I understand you, it is the usual and ordinary thing to be on the inside of the curve?
A. Yes, sir.

No cross-examination.

72 EDMUND BARBER sworn for the plaintiff.

Examined by Mr. BAKER:

Q. Where do you live?
A. 318 Lafayette St. East.
Q. What is your business?
A. I am in the hardware business now. I used to railroad.
Q. How long were you railroading?
A. On and off for the last 13 years.
Q. What did you do on the railroad?
A. Broke.
Q. Brakeman?
A. Yes, sir.
Q. What road did you brake on?
A. The Detroit, Grand Haven & Milwaukee and the Lake Shore.
Q. How many years did you brake on freight trains?
A. On and off for the last 13 years.
Q. Will you inform us in coupling cars upon a curve which is the proper side for a coupler or brakeman to be?
A. On the inside of the curve.

Q. Is that the usual custom or practice among old and experienced brakemen?

A. Yes, sir.

Q. Is there any reason for their being on that side?

A. Why yes, in order to give the signal to the engineer and fireman; you cannot see them from the other side.

73 Q. Will you state whether signals are usually communicated directly backwards and forwards between the coupler and fireman or engineer—whether that is their usual custom?

A. How?

Q. Is it usual for the coupler to signal the engineer himself, or the fireman?

A. The fireman generally.

Q. Is it the usual thing to have somebody else to carry the signals or pass the signals?

A. No, sir.

Q. So that an old and experienced brakeman would expect to go on that side and give the signal himself?

A. Yes, sir.

Q. And if he was on the other side he could not do the work at all, could he?

A. Not principally himself.

Q. You have heard these witnesses describe the cars here, have you not?

A. Yes, sir.

Q. And you say you used to work on the Detroit & Milwaukee road?

A. Yes, sir.

Q. Do you know the cars that are called the Wabash & Erie or marked Wabash & Erie?

A. I do.

Q. Will you state whether the Wabash & Erie has the same kind of dead-woods and the same kind of draw-bar as the cars of the D. & M. that have been described here?

74 A. A great many of them have the same—that I know.

(No cross-examination.)

The court then adjourned to 10 a. m. to-morrow.

75 JUNE 23D—10 o'clock a. m.

HENRY D. LUDDEN sworn on behalf of plaintiff.

Examined by Mr. BAKER:

Q. Where do you reside?

A. In Detroit.

Q. What is your business?

A. I am a civil engineer.

Q. The city engineer of Detroit?

A. Yes, sir.

Q. Will you state whether you have had any experience in railroad engineering?

A. I have.

Q. How many years' experience?

A. I presume 20.

Q. Have you had experience as an engineer in laying curved tracks?

A. Yes, sir.

Q. I suppose you did more or less of that work all the time you were engaged in railroading?

A. More or less of it; yes, sir.

Q. Will you state what is the usual radius that would be used in laying curves—about how short a radius would ordinarily be used?

A. On main tracks generally about 700 or 800 feet, or on turn-outs.

76 Q. What would be the usual radius in a yard—say for side tracks?

A. That would depend a great deal upon circumstances.

Q. Well, sir, stating a case, suppose a side track is laid in a yard, and the first curve from the tangent, I believe you call it, or straight line, has a radius of 98.80 feet throughout, would that be a very sharp curve?

A. Yes, sir.

Q. Would it be an unusually sharp curve?

A. I should think it would; yes, sir; the radius as ordinarily used in engineering is half the diameter of the circle.

Q. So that [in] a railroad laid upon a radius of 98.80 feet, if the curve was continued, you would have a railroad running upon a circle with a diameter of less than 200 feet?

A. Yes, sir.

Q. Well, that would be rather a remarkable railroad, would it not?

A. If it was carried out to any extent it would be.

Cross-examination:

Q. How recently have you had any experience in building railroads?

A. Within two years.

Q. Where was it?

A. On the Butler & Wabash; union depot.

Q. Any other experience than that within two years?

A. Yes, sir.

Q. Where?

A. I was on what is now the Grand Trunk, from Port Huron to Lansing.

77 Q. When?

A. It was then called the Port Huron and Lake Michigan.

Q. That was not within two years?

A. No, sir; that was some time ago.

Q. How many years ago was that?

A. That was from 1866 to 1869.

Q. Did you lay any track or survey for any track to be laid in the yard of the company at Port Huron?

A. Yes, sir.

Q. Do you know anything about how the tracks are situated there?

A. I do not at present.

Q. Do you know anything about what radius any of those tracks were at that time?

A. I don't now; no, sir.

Redirect:

Q. Has any device been discovered within two years by which they can lay sharp curves successfully and properly?

A. Those things are based on arithmetical formula.

78 EDMUND BARBER recalled for plaintiff.

Q. You know this Mr. Keith who testified here yesterday?

A. Yes, sir.

Q. Will you state whether or not you have worked in his company on the Milwaukee road?

A. I have worked in the yard around where he was.

Q. So that you know his manner of working?

A. I do.

Q. Will you state whether or not it was usual for Mr. Keith in coupling cars upon a curve to be upon the inside or upon the outside of the curve?

Objected to as incompetent and immaterial.

Mr. BAKER: I want to show by this witness that their expert, who testifies that the proper place was on the outside of the curve, was almost invariably accustomed to be on the inside in working himself.

COURT: I do not see why a witness may not be impeached by showing he did certain acts inconsistent with his testimony, as well as using certain words that would be inconsistent.

Exception for defendent.

Q. Will you now answer what Keith's custom was?

A. I think he coupled as many on the inside as he has out in that yard and more too.

No cross-examination.

79 HENRY J. LOVETT sworn for the plaintiff.

Mr. BAKER:

Q. Where do you reside?

A. In Detroit.

Q. How long have you lived here?

A. About 3 years.

Q. What is your business?

A. I am employed as a fireman on the Detroit, Grand Haven & Milwaukee road.

Q. How long have you fired on that road?

A. About 26 or 28 months.
Q. Did you know Tuttle in his life time?
A. Yes, sir; I have seen him.

COURT: Mr. Baker, I don't know but I shall have to reconsider the ruling I just made. As I recollect Keith was your own witness.

Mr. BAKER: Yes, but that was in response to a question brought out by them on cross-examination as to what they claimed was contributory negligence.

COURT: I don't think you can impeach your own witness. You may strike out the testimony of Mr. Barber when last called. It did not occur to me at the time that Keith was your witness.

Exception for plaintiff.

Q. Were you fireman upon the engine when Tuttle was killed?
A. I was, sir.

Q. How did you go down to that siding—all together on
80 the engine, or otherwise? Do you remember about that?

A. I don't understand your question. How do you mean all together?
Q. When did you commence to work?
A. Two or three minutes after 1 o'clock.
Q. And worked all the afternoon under Mr. Keith's charge?
A. Yes, sir; so I understand.
Q. At the time Keith was killed, which side of the curve was he, inside or outside?
A. I don't think that question altogether proper, because I don't think Keith was killed.
Q. Mr. Tuttle?
A. I suppose he was killed on the inside of the curve; I could not see from where I was.
Q. Where were you in the engine?
A. I was on the left-hand side of the engine at my place.
Q. And he was killed on the inside?
A. So I understand.
Q. Will you state whether more than one attempt was made to couple this car?
A. Yes, sir; I think there were two or three made.
Q. How many attempts were made before he was killed?
A. I think two or three; I would not be positive.
Q. When those attempts were made how were the signals to slack back received at the engine?
A. I could hear Tuttle holler, and I had to take the signal from his partner at the same time; that is McDermott, I believe.

81 Q. Which side of the train was McDermott on?

A. He was on the same side I was on—the left-hand side.
Q. On the other side of the curve?
A. On the outside of the curve; yes, sir.
Q. Where was the engineer?
A. On the right-hand side of the engine at his post.
Q. Those signals were received then in two ways—that is, you could hear Tuttle holler and his helper also?

A. Yes, sir; and his helper gave me the signal also.

Q. How was the signal received for the next attempt or the fatal attempt?

A. I don't think, if I remember right, I heard anybody call to slack back, but Mr. Keith had walked down that way, and he had got out of my sight, and I think McDermott gave me the signal to slack ahead, and I got a signal to slack back.

Q. Did you hear Tuttle at that time?

A. I don't remember.

Q. As you slacked back what occurred? What first attracted your attention?

A. The first that attracted my attention McDermott gave me a signal to slack ahead as quick as I could. Sometimes you get the signal that way, and the person understands they want to slack ahead quick; there is something wrong. I told Stevens, "Slack ahead as quick as you can; slack ahead quick," or something of that kind. I won't be sure [of] the words I used.

Q. Did he slack ahead quick?

A. He did.

82 Q. Then what did you do?

A. McDermott then gave me the signal to stand still.

Q. Did you go back to see what had occurred?

A. After two or three minutes, I suppose.

Q. Where was Tuttle when you got back there?

A. Between the rails, I think; about 6 feet from the end of the car.

Q. Nearest you?

A. No; the cars were about 6 feet apart, and he was lying nearest to the car furthest back.

Q. How many feet from the car that was on the slip?

A. I say about 6 feet from the car that way.

Q. Who was with him when you got there?

A. I could not tell you all who were there. I didn't notice particularly.

Q. Were Keith and McDermott there?

A. I think McDermott was there, but I think Keith had gone for a doctor before I got there. I would not be certain on that.

Q. Was he lying between the tracks or across one of the rails? State how he was lying on the track.

A. I could not state positively how he was lying. I don't remember.

Q. Can you inform us whether at the time you saw him he had been moved at all from where he fell?

A. I think by the time I saw him somebody had his head on their arm and were rubbing him—chafing his hands.

Q. So you could not say whether he had been moved or not?

A. I could not positively.

83 Q. Have you looked at that track recently?

A. Yes, sir; a few days ago.

Q. Can you tell us about how many feet it is from the end of the track, from the rail, to the place where you saw Tuttle?

A. Yes, sir; I could tell pretty near.
Q. Well, just get at it as near as you can.
A. About 70 feet.
Q. To where you saw him?
A. Yes, sir.
Q. That is, from the end of the rail or bumper?
A. From the end of the rail. I suppose there is not much difference between the end of the rail and the bumper. I did not make an exact measurement.
Q. Did you measure that track last night?
A. I did not measure the track. I could not get a correct measurement, because there were cars there.
Q. You and Mr. Springer measured it together?
A. Mr. Springer and I were there together.
Q. You had used that switch before, or seen it used?
A. Yes, sir.
Q. Will you state whether or not when the car was backed against the post or bumper on the end of the dock the draw-head would hit the bumper or slip by?
A. From what observations I took at the time I could not say whether it would or not.
Q. Were there any indications on the bumper that the draw-head had slipped by?
84 A. I merely gave it a casual glance. I could not say whether it would or not.
Q. I mean the spile the cars butt against on the dock?
A. That bumping-post you speak of is merely a spile to tie boats to; it don't come even with the track. The draw-bar of a car could pass it, I think.
Q. As I understand you, that was a spile there—a part of the dock?
A. Yes, sir.
Q. And the draw-bar of a car as it went back where the spile [was] would slip by?
A. Yes, sir; I think so. I never have been there when a car was there.
Q. So that a car would extend over the end of the track a little?
A. Yes, sir.
Q. How far is it from the end of that rail to the spile?
A. Not over 18 inches at the most.
Q. About 18 inches?
A. Somewhere about that. I could not say to 5 or 6 inches; somewheres about 18 inches; not over that, I don't think.
Q. You measured from where you saw Tuttle to the spile on the ground, did you?
A. No, sir; I don't think I did.
Q. Well, how did you measure?
A. Mr. Tuttle was lying about 6 feet from where we measured. We measured to where the corner of the car stood.
Q. That is, the corner of the two cars that were on the side track?
A. Yes, sir; that were on the slip.

85 Q. How many feet was that, or yards?
A. About 21 yards, I think.
Q. And you saw Tuttle a few feet beyond that?
A. Yes, sir.
Mr. MEDDAUGH: When he says beyond what does he mean—still further from the river?
A. Yes, sir.
Mr. BAKER: You had not known Tuttle long, had you?
A. No, sir. Mr. Tuttle worked Saturday night on the Transit road with me and on Monday he was killed, I think.
Q. That was all the time you had known him?
A. That is all the time I had known him. I don't remember of ever seeing him before the Saturday night.
Q. You remember the building that stood on the river side of this track?
A. I do.
Q. Do you remember a pile of staves that were there at that time?
A. Yes, sir; I think there was a pile of staves there at that time.
Q. How high was that pile of staves?
A. I should say 4 feet. It might be a little more or less. I didn't measure it. I didn't take any particular interest in them at that time.
Q. At the time this last attempt was made was this shanty that was there then between the engineer, as he was sitting on the right-hand side of the engine, and Tuttle?
A. I was not on that side of the engine. I could not tell.
[Q.] How many cars were between Tuttle and the engine when he——?
[A.] ——.
86 Q. How many cars did the engine have hold of at the time you attempted to make this last coupling?
A. I would not be positive of that.
Q. About how many?
A. About 6 or 7.
Q. About 6 or 7?
A. I could not say. I don't think it was over that.
Q. Did you look at these two cars at the time Tuttle attempted to couple?
A. I just merely looked at the draw-head. I didn't look at the numbers of the cars.
Q. What kind of draw-heads did those two cars have?
A. One of them, I think, had a flat, heavy draw-head with a flat end to it.
Q. Which car was that?
A. That was the car connected to the engine?
Q. That was a D. & M. car?
A. I could not say. I don't know.
Q. How was the other head?

A. I think it had a slot in it to save the fingers when a man was holding the link. I could not say which one.

Q. That was the only difference?

A. That was the only difference. I did not look to examine it.

Q. State whether those draw-heads looked to be out of repair or not.

A. I could not say. From what I looked — I should say they were in perfect repair. I did not put my hands to them.

Q. Well, you saw them there?

A. Yes, sir. I didn't see anything wrong.

87 Q. With the draw-bars?

A. Or with the draw-bars.

No cross-examination.

88 WILLIAM CIPHER sworn on behalf of the plaintiff.

Q. Where do you live?

A. In the city of Detroit.

Q. What is your business?

A. Brakeman.

Q. What road?

A. The Michigan Central.

Q. Are you on the Michigan Central?

A. Yes, sir.

Q. What other roads have you broke on?

A. The Chicago, Milwaukee and St. Paul, Chicago & Grand Trunk, Detroit, Grand Haven & Milwaukee.

Q. You have been on the Detroit, Grand Haven & Milwaukee?

A. Yes, sir.

Q. How long since?

A. In 1881.

Q. Do you know Mr. Keith, the witness who was sworn here yesterday?

A. Yes, sir; I do.

Q. Did you ever work with him?

A. No, sir; I never did.

Q. As a brakeman, I suppose, it has been your duty to couple cars?

A. Yes, sir.

Q. Freight-cars?

A. Yes, sir.

Q. Will you state what the usual and ordinary practice is among experienced brakemen in coupling cars upon a curved track—as to which side of the track the brakeman would stand?

89 A. Well, I always coupled them on the inside of the curve.

Q. Have you seen other brakemen work?

A. Yes, sir; I have.

Q. What is the usual practice as to that?

A. I have always seen them do the same thing.

Q. Is there any reason for it?

A. Yes, sir, there is; the fireman can see you.

Q. So the fireman can see you?
A. Yes, sir.
Q. What occasion is there for the fireman seeing you?
A. If you were on the outside no one could see you make a coupling.
Q. Could not give the signals, do you mean?
A. Yes, sir; no one could see you.
Q. Suppose you fell down?
A. You would get run over then, or get killed; one of the two.
Q. That is, as I understand you, you would stand on the inside of the curve so the engineer and fireman could see you?
A. Yes, sir; that is the way I always made a coupling; that is the way I have seen them made.
Q. And it serves two purposes: to make the signals, and, in case of accident, it protects you?
A. Yes, sir.

No cross-examination.

90 HARLOW P. DAVOCK sworn on behalf of the plaintiff.

Mr. BAKER:

Q. Where do you reside?
A. Detroit.
Q. What is your business?
A. I am in the office of Maybury, Conely & Lucking's law office.
Q. Have you ever followed any other business?
A. Yes, sir; I was a civil engineer for 12 years.
Q. Whereabouts?
A. I was on the St. Louis, Cairo & Vincennes road; I was in Cleveland, Ohio, four months, as city engineer; I was on the Erie railroad; I have been on the Cincinnati Southern about 4 or 5 years, and then I was on Government work 6 years and a half, and afterwards I was in Oregon.
Q. Will you state whether or not you have had any experience in laying curved tracks and have surveyed for the purpose of laying curved tracks?
A. Yes, sir; I have.
Q. About how much experience have you had in that?
A. Well, I was on the St. Louis, Cairo, and Vincennes road, now a part of the Wabash; I was then engaged in that particular work perhaps four or five months; just in that class of work; that is, after a railroad is finished of course an engineer does a good deal of surveying and laying out of tracks; when I was on the Erie road one winter I made surveys for the yards on the eastern division of the Erie road, between Port Jervis and New York city, in laying out tracks in yards.

91 Q. In laying out side tracks in a yard, what is the usual curve or what is the shortest radius usually used?

A. Well, in yards we do not follow a standard as closely as we do on a main line.

Q. You may first give us the usual radius or standard on a main line.

A. On a main line about a 600-foot radius, but in a yard I would not want to guess a curve much smaller than 300 feet, but there are circumstances where you may be compelled to; it is very hard on the cars of course.

Q. 300 feet would be about all that could be done in good engineering?

A. Yes, sir; I would not like to have a curve of much less than that; of course, if you make the curve smaller than that you have to put on a guard rail; it is hard on the cars too.

Q. Suppose you were laying a curved track in a yard, and there was no mountain or other natural obstacle standing in the way, what would you say about a curve that left a tangent or straight line with a radius of 98.80 feet?

A. I should call that poor practice; sometimes yardmen lay out those curves, you know, instead of the engineer.

Q. What would you say as to whether that curve was good engineering or not upon the facts as I have stated them to you?

A. I should not consider that very good engineering—very good practice; a good many things are affected by that; it is very
92 hard of course on the cars, and they are liable to jump the track unless the speed is very slow.

Q. What would you say as to whether the draw-bars would pass on such a curve or not?

A. I would not like to give an opinion on that. I should think—well, I dare not give an opinion. I [would] rather not, because it is a little out of my line of course.

Cross-examination:

Mr. MEDDAUGH: You think such a curve as Mr. Baker has spoken of was an unreasonable curve. So would I. Of course we all agree about that. We would have admitted it long ago if our friends had asked us to. Now, witness, if you wanted to lay an exceptional track to an exceptional place you would run it on any curve that was practical to get there—in a yard I mean?

Objected to as incompetent. Objection overruled. Exception.

A. Of course in putting in a curve like that we can put in just as sharp a curve—it resolves itself into a question of whether the car is going to hold there.

Q. If you were laying out tracks in a yard and you wanted to get to a particular place where you might want once in a while to run a car, you would make any curve that would enable you to get there, or would you refuse to make any curve?

A. I think in trying to get to a point like that that I would use of course a good deal of care in laying out the curve.

Question read to the witness.

93 Objected to as not proper cross-examination. Question withdrawn.

94 LIZZIE TUTTLE, plaintiff, sworn in her own behalf.

Examined by Mr. BAKER:

Q. Where do you reside?
A. Garrett city, Indiana.
Q. Did you know Orson Tuttle in his life-time?
A. Yes, sir; we were married in 1869. I knew him two years before.
Q. When did you marry Mr. Tuttle?
A. The 27th of October, 1869.
Q. Have you any children?
A. Two living and one dead.
Q. Will you state the ages of the two living children?
A. Bertha Tuttle, 13 last January; Maudine L. Tuttle, 9 years old the 3rd day of April.
Q. What are they?
A. Both girls.
Q. One is 13 years old?
A. Yes, sir.
Q. And the other one 9?
A. Yes, sir.
Q. What was Tuttle's business or vocation?
A. He was a blacksmith when I married him and worked at that 2 or 3 years; then he went to railroading and has railroaded ever since.
Q. And continued railroading to the time of his death?
A. Yes, sir; about a year he had the rheumatism—caught a heavy cold.

Q. He railroaded continuously, except about a year when
95 he was troubled with the rheumatism?
A. Yes, sir.
Q. What did he do on the railroad?
A. He broke and was a conductor.
Q. He was a brakeman?
A. Yes, sir.
Q. Where did he reside when you married him?
A. In Noble county, Indiana.
Q. Did you remain in Indiana from that time to the time you came to Michigan?
A. Yes, sir.
Q. When did he come to Michigan—how long before his death?
A. About two months.
Q. Don't you know where he worked?
A. He worked on the Wabash road about 4 weeks; then he went to the Lake Shore and was there about 4 weeks.
Q. Then where did he go?
A. On the Milwaukee and Grand Haven.
Q. Was he home during any of this time?
A. Yes, sir; he was home twice during his last trip. He wasn't home the last time, but intended to come home the next Sunday.

Q. That is, you expected him home the Sunday following his death?

A. Yes, sir.

Q. Will you inform us about what wages Mr. Tuttle was in the habit of earning as a brakeman?

A. I could not tell all the time—a part of the time. I don't really know what he got when braking; when he was con-
96 ductor he got from sixty-five to seventy-five dollars.

Q. Do you know what wages he was getting on the Detroit & Milwaukee road when he was killed?

A. I think it was $2.50 a day; I could not tell.

Q. $2.50 a day?

A. Yes, sir.

Q. How old a man was Mr. Tuttle?

A. He was born in 1849.

Q. How old are you?

A. 32.

Q. Will you inform us whether or not your husband supported his family and treated them kindly?

A. Yes, sir; I have known him 15 years and I never knew him to give me a harsh word.

Q. How about his supporting his family?

A. There was nothing that was too much for him to do whenever I asked him.

Q. As he was a man that worked for a salary or worked for wages, will you tell us about what sum a month he applied to the support of his wife and family—what did you have, as he was away braking upon the different roads—what did you have to maintain yourself and children with from him I mean?

A. As near as I can tell from thirty to thirty-five or forty dollars a month. It don't need so much to live there as it does here.

Q. How long have you lived in Garrett city?

A. 5 years last April.

Q. Will you state whether you and Mr. Tuttle had discussed
97 the question of moving to Michigan?

A. Yes, sir.

Objected to. Objection sustained.

Mr. BAKER: We want to show that he didn't purpose to be permanently away from his family.

COURT: I don't think that is competent.

Exception for plaintiff.

Q. Is this one of the children in the court-room?

A. Yes, sir.

Cross-examination [by] Mr. MEDDAUGH:

Q. You were married in 1859 or 1869?

A. 1869.

Q. Do you know whether your husband had been married before that?

A. No, sir; he never was.

Q. Well, I didn't ask you that, because it is very difficult for you to say. I asked you if you knew of his being married before that?

A. No, sir.

Q. Do you know that any other woman claimed to be his wife?

A. That is the report I have heard.

Objected to as incompetent.

Mr. BAKER: I move to strike out that answer.

COURT: Yes; I do not think it is a competent way to prove it; although I suppose it is proper to prove the fact by competent
98 evidence, although this woman is the administratrix of his estate. I don't think you can prove it in that way.

Q. When were you in the habit of getting $35.00 to $40.00 a month from him?

A. He just gave it to me when I asked him for it.

Q. How much money did he give you a month before his death?

A. I had plenty of money at home.

Q. Did he give you any?

A. Not the last month he was gone. I intended to——→

Q. Did he give you any money previous to that?

A. Yes, sir.

Q. How much?

A. $35.00.

Q. Where was he at work at that time?

A. On the Wabash.

Q. How much did he give you for the month previous?

A. I could not say; he gave it to me as I asked him—5 or 10.

Q. Did he always give you money when you asked for it?

A. Yes, sir; never refused.

Q. Had you any other means of support except your husband?

A. No, sir.

Q. You depended on him entirely for your support?

A. Yes, sir.

Q. You didn't do anything else?

A. No, sir; never was able to.

Q. When was it he was conductor?

A. About 3 years ago.

99 Q. Whereabouts?

A. On the Baltimore & Ohio.

Q. What kind of a conductor—freight or passenger?

A. Local freight.

Q. How long?

A. I could not say just how long.

Q. You don't know how long he was a conductor?

A. No, sir.

Q. Can't you tell something about how long he was conductor; you were living with him then, were you not?

A. Yes, sir.

Q. Were you living in Ohio?

A. No, sir; in Garrett city?
Q. Was he away from you?
A. He would be home every other night.
Q. You don't know whether he was there one month or six?
A. Over a year.
Q. Prior to that time what was he doing?
A. He was foreman in the yard nearly two years.
Q. Of what road?
A. The Baltimore & Ohio.
Q. How long was he foreman of the yard of the Baltimore & Ohio?
A. Nearly two years.
Q. Where did he go from there after he ceased to be conductor?
A. Into a cigar store.
Q. Where?
100 A. In Garrett city.
Q. Why did he leave the Baltimore & Ohio road?
A. On account of the rheumatism.
Q. How long did he remain in the tobacco store?
A. A year.
Q. Then where did he go?
A. On the Wabash.
Q. What was he doing on the Wabash?
A. Braking.
Q. What part?
A. The Pacific road.
Q. Whereabouts?
A. Running from Detroit to Butler.
Q. How long did he remain braking on the Wabash?
A. A month.
Q. On what train—freight or passenger?
A. Local.
Q. Local freight?
A. Yes, sir.
Q. Why did he leave the Wabash?

Objected to as incompetent.

COURT: I think they have the right in cross-examination, as to the question of damages, to enquire somewhat into the life of the party.

Objection withdrawn.

A. He got bigger wages on the Lake Shore.
101 Q. Was that the reason he left?
A. Yes, sir.
Q. He was not discharged?
A. No, sir.
Q. How long did he remain on the Lake Shore?
A. A month.
Q. How much did he get on the Wabash?
A. I didn't know. I hadn't seen him at all after he went into the

yard here. I didn't know that he was in the yard until I got a letter written the day he got killed; I got the letter that day that he was in the yard.

Q. You didn't see him when he was on the Wabash at all?

A. Yes, sir; he was home.

Q. What wages did he get on the Wabash?

A. I think it was $2.50, if I am not mistaken.

Q. Did he tell you so?

A. Yes, sir.

Q. And he went from the Wabash to the Lake Shore because the Lake Shore gave him larger wages?

A. Yes, sir.

Q. What did he do on the Lake Shore?

A. He was on the local freight.

Q. How much did they give him on the Lake Shore?

A. He told me $2.75.

Q. But he was doing the same business on both roads?

A. Yes, sir.

Q. How long was he employed on the Lake Shore?

102 A. About a month.

Q. And about a month on the Wabash?

A. Yes, sir.

Q. Why did he leave the Lake Shore?

A. I don't know; I didn't see him.

Q. Did he tell you why?

A. No, sir; he wrote me a letter that the reason why he left there was so he would be home.

Q. Which gave him $2.75—the Lake Shore?

A. Yes, sir.

Q. And on the Detroit & Milwaukee, you say, he got $2.50 a day?

A. Yes, sir.

Q. Did you get from him on the average $20.00, take it right along for the last year and a half?

A. Yes, sir; over that.

Q. Did you get $25.00 a month from him for the last year and a half?

A. Yes, sir; more than that.

Q. Did you get $30.00?

[A.] ———.

Q. From 35 to 45 on the average?

A. Yes, sir.

Mr. BAKER: I don't know that it is necessary, but I would like to introduce in evidence the table of mortality, based on American experience, as adopted by the statutes of Michigan and found in the first volume of the compiled laws of 1871, pp. 997 and 990.

It was admitted in evidence.

103 WILLIAM BRAITHWAITE recalled for plaintiff.

Q. Did you help Mr. Campau make a survey of this track?

A. Yes, sir; I made that survey (referring to a diagram).

Q. Is this that I show you, Exhibit B, a diagram or a correct survey of that track?
A. Yes, sir.
Q. Drawn to the scale that is represented here?
A. Yes, sir.
Q. I see upon this plan, Exhibit B, two lines; will you tell us what that represents?
A. That is a double rail.
Q. That is a rail put inside of the rail and used as a guard rail?
A. Yes, sir.
Q. Will you please state the distance from the end of the track on the dock to that guard rail, if you can?
A. Yes, sir (referring to memoranda); it is 52 feet.
Q. How far is it from the end of the track here to the spile that is used as a bumping post from the end of the rail?
A. From the edge of the dock?
Q. Yes, sir.
A. To the spile that is used as a bumping post?
Q. Yes; from the rail to the spile.
A. From the rail to the spile—to the edge of the dock—it is 4 feet.
Q. I don't mean to the edge of the dock.
A. The rail don't run up to the edge of the dock.
Q. I know, but how far is it between the spile that is at the end of the dock and the end of the rail?
104 A. It would be about 3 feet.
Q. Was there a building there when you made this survey?
A. Yes, sir.
Q. Is the location of the building correctly marked upon this map?
A. Yes, sir.
Q. As it was at that time?
A. Yes, sir.
Q. Can you tell how many feet it is from that building to the end of the track?
A. Yes, sir (referring to memoranda); it is 250 feet; that is up to the water dock.
Q. From the building to the dock?
A. Yes, sir.
Q. Do you mean to the end of this spile, the end of the track?
A. Yes, sir; to the end of the spile.
Q. Was this track clear when you were there?
A. Yes, sir; it was clear when I was there.

COURT: About at the foot of what street was that; do you recollect?
Mr. SPRINGER: At the foot of Revard St.

Q. Now, taking a position, say, 60 feet from the end of the track, from that spile which is the end of the track, at a point, say, 60 feet from that, how far beyond this building could you see an engine?
A. I suppose 40 or 50 feet.

Q. Could you see an engine 40 or 50 feet beyond the building?

105 A. Yes, sir.

Q. Did you make a measurement to see?

A. Yes, sir.

Q. Did you make an observation for that purpose?

A. Yes, sir.

Q. Could you testify that you could see an engine standing on the track about 60 feet from the spile; could you see an engine 40 or 50 feet beyond the building?

A. Yes, sir.

Cross-examination:

Mr. MEDDAUGH: When did you make that survey?

A. On the 24th of April last.

Q. This last April?

A. Yes, sir.

Q. Do you know whether the building is now where it was at the time of the accident?

A. No, sir; it is moved.

Q. Do you know how far it has been moved since the accident?

A. No, sir; I do not; I noticed it was moved.

Mr. BAKER: I offer in evidence the diagram Exhibit B.

It was admitted in evidence & the original thereof is annexed to this bill of exceptions.

Counsel for the plaintiff here stated to the court that he did not seek to recover on the second count of the declaration, but only sought to recover on the counts alleging the negligent and improper construction of the siding.

Plaintiff rests.

106 GEORGE MASSON sworn on behalf of the defendant.

Examined by Mr. RUSSELL:

Q. You are the engineer of the Detroit, Grand Haven & Milwaukee R'y, I believe?

A. Yes, sir.

Q. How long have you filled that position?

A. Since 1866.

Q. During that time your duty has been that of the ordinary duty of an engineer, laying tracks and making surveys?

A. Yes, sir; I have laid out all the tracks as they exist to-day.

Q. Previous to your becoming the engineer of this road what was your experience as an engineer?

A. I was on the Great Western from the first commencement of it, the location of it in 1850, and I was employed in the location and surveys until 1866, when I came on this road, and I have had charge of the tracks, buildings, bridges, and everything of that kind ever since.

Q. You were employed in the construction of the London, Wellington & Bruce railroad?

A. The London, Huron & Bruce; I planned and built that.

Q. You have perfect knowledge of all the details of laying track, both in yards and on main lines?

A. Oh, yes.

Q. Have you constructed the sidings and curves leading out of the Transit railway and operated by this company?

A. Yes, sir.

Q. I will ask you how the curve in question here compares
107 with some of the curves upon the Transit railway?

Mr. BAKER: I object to that as incompetent.

Objection overruled. Exception.

Question read.

A. Of the sharp curves on the Transit railway very few of them, indeed, exceed 100 radius, and they are worked and worked with safety every night, and to my knowledge I don't know of any one being hurt on that road.

Q. State first what this track is—what it is there for.

A. It was put in to unload timber which comes in off the line into the slip. The Lake Shore property comes very close up to here (referring to the diagram). We cannot go on their property; we are confined to that; but at all events the intention of this track was to unload timber into that slip. The vessel lies here and it is loaded into the vessel and goes down to Quebec or Montreal. The very object of the track was to get alongside of that slip, so it would dump the timber into the ship. It was done for the convenience of shippers.

Mr. MEDDAUGH: Was it for any other purpose—not used for any other?

A. No, sir; that is the purpose for which it was made; if it is used for anything else it is for storing a car or two which it is convenient to keep out of the way.

Q. What do you say as to the practicability of working that siding safely, with proper care?

Objected to as incompetent.

108 Objection overruled. Exception for plaintiff.

Question read.

A. Oh, so far as the working of it is concerned, there can be no doubt that if the man who is coupling cars keeps on the outside he is actually safer than on a straight line. There are more men killed on the straight tracks in the yard during the same time, I fancy. In fact this is the only time a man has been caught on the curve. Of course there are always more or less accidents in the yard, but the man could not possibly have been caught if he was on the proper side.

Mr. BAKER: Have you charge of the accident department?

A. No; but I am quite aware when that happened, and I am trying to explain the use of tracks like this. I should think it was good engineering.

Objected to.

Q. What were you going to say about that?

A. I would always try to get the largest radius for the curve that circumstances would permit. It is good engineering to get all that can be got within certain limits.

Q. But there are always exceptional cases which require sharp curves?

Objected to as leading and as too general.

COURT: I will sustain the objection as leading. On the other ground I think it is proper.

Q. You are familiar with the construction of tracks in yards generally, are you, in depot yards?

A. Yes, sir.

Q. And the character of curves, and so forth?

108½ A. Yes, sir.

Q. Will you state whether such acute curves as that in tracks in yards is common?

Objected to as incompetent. I do not suppose they can excuse negligence because they prove they are in the habit of doing the same thing. Objection overruled. Exception for plaintiff.

Q. In exceptional tracks in all yards; not in common tracks?

A. Yes, sir; I should say in a great many I know it is so.

Q. Is it practical, to operate a general yard like this of the Detroit & Milwaukee with occasionally having such acute angles in your tracks?

A. No, sir; we are so confined for room that curves of a very short radius are a necessity.

Q. And is not that a common necessity in all depot yards, so far as you know?

A. Yes, sir; no doubt about it.

Cross-examination:

Mr. BAKER: Where were you educated for an engineer?

A. I served under Mr. Benedict and Mr. Spaulding; Mr. Spaulding was a major general in the army afterwards; went to the army and was one of the engineers during the war.

A. Whereabouts did you serve your apprenticeship?

A. On the Great Western.

Q. On the Great Western railroad of Canada?

A. Yes, sir; I got my appointment through them.

109 Q. And you came over onto the Milwaukee road in 1866?

A. Yes, sir; but I had been on the Atlantic and Great Western before that, and I located a road through the whole State of Wisconsin before that.

Q. You laid out this Transit road, didn't you?
A. I laid it out?
Q. Yes.
A. No; I put in all the short tracks, but I did not plan the original road in the first place.
Q. No; you did not survey the line; did not make the original survey, but you laid these short tracks?
A. Yes, sir.
Q. And you laid all the other short tracks in the Milwaukee yards, didn't you?
A. No, sir; there were far more when I came on the road than exist to-day. I made the radius of all the curves as large as I possibly could.
Q. What is the smallest radius you have got in that yard?
A. To-day?
Q. Yes, sir.
A. There are curves of 200 feet radius. This was put in for 180 feet, and there are curves of 200.
Q. This is the shortest one in the yard, isn't it?
A. I think very likely.

COURT: What is the radius of this?

110 A. 180; but the rails are straight in the curves; they are about 30 feet long, and the curve is made up of these chords, the length of the rail. I gave my track foreman the length of the curve, but he may not have followed it exactly. I staked it out for a 180 feet radius. Cars, of course, have been off the track at different times. The track was kept up by the track foreman. It might vary for the length of 25 feet, perhaps; but that it was a shorter curve for a distance of 25 feet of it I would not dispute.

Mr. BAKER: That is, you laid out this general curve, or staked it out, and then it is the track men who lay the track and adjust the rails to your survey?
A. That is it exactly. It was all right in the first place, but of course in a railroad yard a car will get off the track sometimes, and the track is disturbed; so, as I say, for the length of 30 feet it may show a different radius from what I say, but the intention was 180 feet.
Q. You would not think of laying one as short as that?
A. Oh, yes; if I had to.
Q. Well, you didn't have to here?
A. No; laid it exactly what it could be laid.
Q. You could lay one here and maintain one with a 180-foot radius, and it is practical for you to do that?

Objected to.

Q. The question I put to you, and as I understood you to answer straightforward and intelligently, was that it is perfectly
111 practicable to maintain a curve here with a 180-foot radius?
A. Yes, sir; and, so far as I know, it is that now.

Q. But you would not dispute that it might have been changed so that it was shorter for 25 feet?

A. No; it would not make a difference of more than half a rail, and for all practical purposes it would make no difference in the working of that track—a little variation in a short chord—because, when you come down to such small radii as that, the difference, although apparently large—the difference between 180 and 90 feet, although apparently large—really don't amount to much in practice.

Q. That is, as to Tuttle and other brakemen it don't amount to much in principle in engineering?

A. Yes; it amounts to a good deal. I would not want him to be hurt, or any one else, and if he had been on the other side he would not have been.

Q. You say it would not make any difference between 180 and 90 feet?

A. What I said was that the tracking of the cars around that curve it would make very little practical difference in, because——

Q. So far as the use of the track by the cars was concerned, now, Mr. Masson, would the draw-bars pass each other if you attempted to couple cars on a curve with a radius of 180 feet?

A. In two particular cars such a thing might happen. Speaking generally I would say it would not, although I have seen
112 such thing on a straight line.

Q. Certainly, where the slip by each other. Would they not pass each other where there was a straight track, with a curve leaving it the first 25 feet, with a radius of 98.80?

A. I don't think so. Up at Russell's car factory they have a radius of some 90 feet, and they take cars out of there constantly. They take them out with no such trouble.

Q. I didn't ask you about any other case. I ask you if an engineer——

A. I say from my experience they would not from what I have seen. I know nothing about this particular case at all.

Q. Well, then, you would say, would you not, that on a track where they did pass where the curve was great—where they did pass they were out of repair?

A. No, not necessarily; it does not follow.

Q. How short do you think the radius would have to be in order to have the draw-bars pass each other?

A. I don't think they ought to pass at all on any curve the wheels would follow.

Q. What is the shortest curve wheels would follow on a car of 35 feet?

A. 90 is the shortest that I know of, but I have no doubt that on a street railway they turn shorter. It all depends on the length of the car and the distance between the wheels?

Q. You say this track was intended for timber?

A. Yes, sir.

Q. Have you any explanation to offer of how there hap-
113 pened to be five or six straight cars down there?

A. All tracks are used for general business if necessity requires.

Q. Then you do not mean to be understood that that track is not used for general purposes?

A. I think if I remember I stated it was used for storage purposes at times.

Q. That it was used for part of this yard.

A. For storing cars and unloading cars and storing timber.

Q. Now, it is good engineering, I suppose, to get as large a curve as you can with as large a radius as possible?

A. Yes, sir; without going to a great extreme—within certain limits.

Q. Have you had any experience in other yards besides the Detroit & Milwaukee and the Transit road? Do you know anything about the curves in the Michigan Central yard?

A. Not from my own knowledge; only from observation.

A. It is difficult to tell by the naked eye, is it not?

A. No, sir; I remember there used be a curve down in the Michigan Central——

Q. How long ago is that?

A. 7 or 8 years ago or two or three years; I know I have seen it.

Q. But your testimony is confined to the Detroit & Milwaukee road and the Transit road, which was laid out by you?

A. Not necessarily so.

Q. What other short curves have you any knowledge of?

A. I have put in curves in the Hamilton yard, the yard of the Great Western, which is a yard like this.

114 Q. How long ago is that?

A. In 1854.

Q. What was the shortest radius in that yard?

A. The case I speak of was 200 feet.

Q. It was the shortest one in that yard?

A. The shortest one I had anything to do with.

Q. You say this track here is the shortest one in the yard; what is the next shortest one? Now you laid out the whole yard, as I understand; what is the next shortest radius?

A. I could not very well explain that to you without having the plan of the yard here to show you.

Q. Can't you remember?

A. Yes, sir; I know that perfectly well, but how will you know?

Q. Well, I am trying to find out what is the shortest radius.

A. There are several tracks.

Q. Now, Mr. Masson, is there a radius in that yard outside of this one that is less than 180 feet?

A. Yes, sir; I think so; I think the track going onto the dock next to the elevator is less than 200 feet.

Q. What is the radius of that curve you refer to?

A. Going into the dock?

Q. Yes, sir.

A. About 200 feet.

COURT: Then the workmen did not build this track according to your plan?

A. Yes, sir; it was built according to the six stakes I gave them at the time, but it has been in constant use and worked
115 and shifted about for them to load the timber; the object of the track was to get to the slip with lumber.

Q. It changed the radius then?

A. Yes, sir, it has changed in one way, but I would like to explain that it has not changed in any way to affect the working of the track; that the difference between that and 180 is practically no difference, as far as the wheels are concerned.

Mr. MEDDAUGH: Will you please explain that to the jury?

Objected to.

COURT: You had better reserve that to the cross-examination; you can explain it then.

Mr. BAKER: Now this track at the dock you say has a radius of about 200 feet?

A. It is about 200 feet.

Q. Is that the shortest radius next to this one?

A. There are a number with the radius about the same—coal tracks.

Q. When you laid this out you laid it out at 180 feet?

A. Because that was all I could get.

Q. What was the object of it?

A. To get to the slip, so the shippers could unload their timber into the slip.

Q. How much territory has the company north and east of this slip?

A. This is the line (pointing to a diagram produced by the railroad company).

116 Q. Is this plat which I show you, Exhibit C, a map of the yard as it now is?

A. Of that portion of the yard.

Q. Is the building marked upon this plat "car repairer's house" the building that has been referred to here in the testimony?

A. I believe so; I think there is no doubt about that.

Q. Now, these blue lines across this map represent tracks, do they not?

A. Yes, sir.

Q. In laying out this track your object was to get alongside of the slip?

A. Yes, sir.

Q. The land of the company, as I understand you, lies between the slip and the light line north?

A. Except that block the Lake Shore owns.

Q. That is, the block in one corner of this territory is owned by the Lake Shore?

A. By the Lake Shore; the tracks colored red are Lake Shore tracks; those colored blue are the Detroit & Milwaukee tracks.

Q. If you desired to lay a side track alongside of this slip, could you not do it by starting off from one of these other tracks and not have so much curve?

A. You couldn't do it.

Q. Why didn't you commence upon the track that lies furthest to the east, nearest to the river?

A. You couldn't do it.

117 Q. Couldn't you get across this track?

A. I don't think a man's life would be worth much if you had it laid in that way; it would not be safe a minute.

Q. That is, you don't lay any tracks crossing each other?

A. Not if we can help it.

Q. Then a civil engineer might be killed if you did that?

A. Oh, no, sir; I would be very sorry to have anybody killed; I do not desire to make light of this affair; it is a very serious matter.

Mr. BAKER: In connection with the testimony we desire to offer Exhibit C in evidence. It was admitted, & the original thereof is annexed to this bill of exceptions.

Q. As I understand you, in order to put in a larger curve or a curve with a larger radius at this point, it would become necessary for the company to buy some more land?

A. We could not buy it; it is not possible to buy it.

Q. The Lake Shore has it?

A. The Lake Shore has it, and they would not sell.

Q. They would not sell to you?

A. No, sir; or to anybody else.

Q. Do not those two companies use this road in common?

A. Only so far as it is marked; they only use one track in common. The Lake Shore have certain tracks of their own; we have certain tracks; those marked red—the two tracks—are the Lake Shore tracks.

Q. The outside track to the north?

118 A. That is the joint track; that is a common track. The Lake Shore has joined us in order to get into their coal-yard here.

Redirect [by] Mr. MEDDAUGH:

Q. You started to explain the difference between the radius testified to by some of the witnesses of the plaintiff as to that fact and the radius it was laid out at. You said practically in the operation of the track it didn't make any difference?

A. No, sir, not as far as the tracking of the wheels was concerned.

Q. That is it; now explain to the jury what you mean by that.

A. I mean as between a 100 foot radius and a 180-foot radius there would be no practical difference in so far as the tracking of the wheels was concerned; both would require a guard rail, and the same precaution and care would be required to be used whether the radius was 100 feet or 180 feet.

Q. The difference, I suppose, would be in the wear and tear of machinery—the wheels?

A. There would be very little difference in that.

Recross [by] Mr. BAKER:

Q. You mean by that that, as far as the wheels staying on the track was concerned, a curve with a radius of 180 feet has about the same effect as one of 98?

A. At that spot where they are barely moved, if you speak of a main line.

Q. I am not speaking of the main line.

119 [A.] I will say that the mere pushing in of the car makes no practical difference.

Q. If there is no practical difference where the radius is 190 feet, what would you say of one where the radius was only 30 feet?

A. Perhaps the wheels would not go round on that; therefore it would not be practicable.

Q. Every time you shorten the radius it has an effect in proportion to the extent you shorten it, has it not?

A. Well, that might be true—that is, it requires some speed in order to make it appreciable. I say that kind of a thing is not appreciable where you are merely shoving a car—barely moving.

Q. The rails would certainly fit tighter upon a 90-foot radius than a 180-foot?

A. Yes, sir; but supposing the wear on the wheel was the 100 part of a grain, and at 100 feet it was a 1,001 part; you know the difference is not appreciable.

Q. In the wear of the rail?

A. Yes, sir; and the wear on the rails is so small it is not to be considered.

Q. In curves of this kind the cars are more apt to leave the track?

A. Yes, sir; but you go into any yard and you will find cars off the track, and unless you know the cause of this particular thing you could not say what it was; the switch may have been turned for all I know.

120 WILLIAM J. MORGAN sworn on behalf of the defendant.

Examined by Mr. RUSSELL:

Q. You are general superintendent of the Detroit, Grand Haven & Milwaukee railway?

A. Superintendent.

Q. Will you tell us what wages were paid to Orson Tuttle as switchman during the time he was employed by your company?

A. Do you mean the rate of wages?

Q. Yes, sir; the rate per month?

A. We pay them by the day. The pay for all switchmen working with engines is $1.75—working for ten hours.

Q. About what would that amount to on the D. & M.?

A. Well, men working in day work ten hours——

Q. Well, working as this man worked?

Mr. BAKER: Does he know how this man worked?

A. I can tell you to the best of my belief.

Mr. BAKER: We don't care for that unless you know.

Q. Please state.

A. He got 8 days and a half pay at $1.75 per day.

Q. In what length of time?

A. I can't swear that he worked nights, but, to the best of my belief, he worked five nights; the rest was day work. Those five nights make 60 hours.

Q. How much an hour?

A. The pay is $1.75; that would be 17 and a ½ cents an hour; two hours extra for night work; five nights out of that was night.

121 He worked five and a half days in hours; the rest was day work.

Q. To make it a little clearer, at that rate what would he make in a month about?

A. I should have to figure it up. They were working, I guess, at that time, or generally do work, night and day alternately. He would have an opportunity of making six days at ten hours a day and then six days at 12 hours a day; probably they would not work full time Sundays; take one-half of that off.

Mr. BAKER: They worked Sundays too?

A. Yes, sir; as much as we have to.

Q. Will you state whether or not the wages paid brakemen by the several companies—the Lake Shore, the Wabash, and the D. & M.—is about uniform?

Objected to.

A. I am not able to swear to the amount paid by the other roads, but I believe the switchmen on the Lake Shore get $50.00 a month, and they have to work Sundays for that.

Q. And brakemen get what?

Mr. BAKER: Is this your belief?

A. Yes, sir. I am not prepared to say that is the exact amount.

Objected to as incompetent.

Q. As to the employment in the yard, what constitutes a crew?

A. The usual crew is one yard man, a switchman in charge of an engine, and two assistants—that is, for our crews. I do not think that all the roads use as many; I do not think the Lake Shore uses as many.

122 Cross-examination:

Q. You are the general superintendent of this road?

A. I am the superintendent of the road.

Q. How many men did you kill on the road last year?

COURT: Oh, well, I do not think that is competent.

123 WILLIS C. BEAL sworn for the defendant.

Mr. MEDDAUGH:

Q. What is your business?

A. I am chief clerk of the Michigan Southern.

Q. Have you knowledge of the wages paid Orson Tuttle while he was in the employ of your company?

A. I have.

Q. What wages did he earn?

A. The wages that he was earning during the time that he was at work for the Lake Shore was on the basis of $45.00 a month, divided into trips. Their trips were $1.07 from Detroit to Toledo, and they made on an average 39 trips a month, making $45.00, usually. They could make as high as that by working nights; $2.15 *cents* the round trip, making 130 miles.

Cross-examination [by] Mr. BAKER:

Q. What is your business?

A. Superintendent's clerk of the Michigan Southern railway.

Q. How long have you been so?

A. About 8 years.

Q. What was your business before that?

A. Telegraph operator.

Q. Before that?

A. I was a student at school.

124 COURT: You testified as to what Tuttle was receiving from the Lake Shore road?

A. Yes, sir.

Mr. BAKER: We do not object to it, your honor.

Q. Will you tell us generally what an experienced brakeman, one who earned all the money he could by accepting opportunities on the road—that is, followed his vocation closely during the last year or two—say about what he would average in compensation or wages per calendar month; that is, if you can tell us?

A. I could tell you by referring to our record. I could not remember it, of course.

Q. I am not speaking of any particular man, but on the average.

A. The average of the man for the year—do you mean one month on the average of a year?

Q. Yes.

A. About $45.00 or $50.00 a month.

Q. It might go as high as $60.00?

A. No; it would not go as high as $60.00. Steady employment would give him $45.00.

Q. You hire them at so much an hour, practically?

A. We hire them at so much a trip.

Q. You figure the days by hours?

A. We figure the trips by the miles they make.

Q. Suppose they break down and be delayed two or three hours?

A. On the basis of ten hours, they are allowed then so much *pro rata* for all the time they put in of overtime on that one trip, or $1.15 cents a trip.

125 Mr. MEDDAUGH: A certain number of miles makes a trip?

A. Yes, sir.

Mr. BAKER: Opportunities are afforded them for a good deal of extra work?

A. Yes, sir; of course they would have to be at the right end of the road.

Q. But a brakeman who is hunting for every dollar that he can get can get considerable work to do?

A. Yes, sir; but he would have to be at the right and of the road.

Redirect:

Q. I understood you to say what they would make on the average ordinarily would be about $45.00 a month?

A. Yes, sir.

Q. That is your answer to Mr. Baker's question?

A. Yes, sir.

126 2.30 P. M.

KEITH recalled for defendant.

Mr. RUSSELL:

Q. You have heard the testimony, I presume, in relation to the manner in which you couple cars in the D. & M. yard?

A. Yes, sir.

Mr. BAKER: That was stricken out.

Q. What have you to say in regard to the proper way of coupling cars, as to which side of the curve the coupling should be made upon?

Mr. BAKER: This same witness has been examined upon this before. I object.

Objection overruled. Exception for plaintiff.

A. The practice is to take the outside of the curve,

Q. Why?

A. Because it is safe.

Q. And because the other side is not safe?

A. Yes, sir.

Q. How about this particular track?

Mr. BAKER: In what respect?

Mr. RUSSELL: I will withdraw it.

COURT: I think that is proper.

Mr. BAKER: I objected, your honor.

Question not pressed.

Q. I don't remember whether this witness testified as to the manner in which the work was done on the Transit railway.

127 I will ask you whether there is any different method of working the Transit railway from what there is in working the other portion of the D. & M. yard, either in cars, engines, men, or method of work?

Objected to as incompetent and irrelevant. Objection overruled. Exception for plaintiff.

A. It is worked just the same as the rest of them. The same men

have to go up there and do the same work in the night as in the day-time.

Q. Except that it is not done in the day-time?

A. We are not allowed there in the day-time it seems.

Cross-examination:

Mr. BAKER: Did you ever couple a car on the inside of a curve?

A. Not on a curve as sharp as that; certainly I have, but not on a curve as sharp.

Q. Have you ever coupled a car like this on the inside?

A. No, sir; I don't think it.

Q. Curves as sharp as this are very rare, are they not?

A. There are not many of them in the yard, but there are on the Transit railway.

Q. They are mostly on the Transit railway?

A. Well, there are not so many sharp curves there; there are three or four.

Q. But usually, where the curve is not very sharp, you stay on the inside of the curve?

128 A. It depends on which end of the yard we are working in, but where there is a gradual curve there is no danger in coupling on the other side.

Redirect:

Q. Is there any reason why a man coupling cars in the yard where there are three or four or a full gang at work, why he should be on the inside of the curve for the purpose of giving his signals?

A. No; that is the reason why we have three men, for the yard is full of cars.

Q. Where there is a full gang employed there is no necessity for a man being on the inside of the curve for the purpose of giving or receiving signals?

A. No, sir.

Evidence shows there was not a full gang employed to make the coupling. By the last question to Keith the defendant admits that if there was not a full gang employed at making the coupling that it was necessary for Tuttle to be where he was, and that he was not guilty of contributory negligence?

129 JAMES E. BRODY sworn for defendant.

Q. What is your business?

A. Yardmaster of the Detroit, Grand Haven & Milwaukee road.

Q. How much experience have you had in that capacity?

A. I have been employed by this railway since a year ago last January.

Q. How long have you been a railroad man?

A. About 13 years.

Q. Have you had experience in other yards besides the D. & M.?

A. Yes, sir.

Q. What do you say as to the practical method of coupling cars on a curve—the proper method?

A. The proper method is to get on the outside of the curve.
Q. Why?
A. To prevent an accident if the draw-bars should happen to pass. You would be on the proper side not to get hurt.

COURT: What is the probability of your being hurt if the draw-bars pass each other and you are on the inside of the curve?
A. The probabilities are you would get killed, because the cars come so close together they would not allow you to stand there.

Q. Would there not be a space between the corners and the dead-woods?
A. Not in such a sharp curve as that.

Mr. RUSSELL:

Q. Would the corner of the car strike the dead-wood?
A. No.

Q. Upon the outside of the car is there any possibility of
130 a man being squeezed?
A. No, sir; there is no possibility at all.

Q. It has been testified to here that the usual way of coupling cars by Keith and others in this yard was on the inside of the curve. Was that the fact?

Mr. BAKER: Wait a moment; that is objected to. It was not confined to Keith and others in this yard. We proved that was the general custom among brakemen and other men.

Q. What do you say as to the custom of coupling cars on a curve; whether the coupling should be made on the inside or the outside?
A. A man can couple a car easy enough on a small curve, but I should think on a big curve it showed poor judgment for a man to get on the inside of the curve on a big curve, on a sharp curve like that down there.
Q. You are accustomed, are you not, to working cars upon the Transit railway?
A. Yes, sir.
Q. About the sharpest curves upon the Transit railway?
A. Yes, sir.

Cross-examination [by] Mr. BAKER:

Q. You say it is safe enough to couple a car on the inside of a curve where a curve is large?
A. Yes, sir.

Q. And it is the custom to do it, isn't it, upon that side?
131 A. It depends on what side you are working upon.
Q. If you were working on that side?
Q. You would not go over if you were working upon that side.
Q. That is, on a gradual curve you would work on the inside?
A. If I was working on that side I would couple on that side.
Q. That is, these brakemen or couplers either work on one side or the other?
A. No.

Q. Then what do you mean by working on that side?

A. It depends on which side you started to work. Sometimes you would start on the fireman's side, sometimes on the engineer's.

Q. Suppose you started to work on the inside of the curve, or suppose you started to work on a straight part of the track, and as you worked along you worked upon a curve part of the track, you would continue to work upon that side, would you not?

A. Not if it was too sharp a track.

Q. If it was an ordinary curve you would continue to work there?

A. Yes, sir.

Redirect:

Q. Suppose there was a line of cars standing on a parallel track—suppose there were two tracks side by side?

A. That depends on how many cars you have.

Q. Suppose there is a line of cars there in a curve, where it would otherwise be safe to couple there, would you not take
132 the other side of the curve?

A. Certainly, if I thought there was any danger.

Q. Suppose there were cars that obscured the engine; you would take the outside then, would you not?

A. Yes, sir.

Recross:

Q. That is, if you commenced to work on that side? Is that what you mean? That is, if you commenced to work on that side you would stay on that side, would you not?

A. If you will explain what you want I can tell.

Q. Suppose you commenced to work on the outside of a curve, would you stay on that side of the curve?

A. Not if I thought there was any danger.

Q. Suppose you commenced to work on the inside of a curve and you didn't think there was any danger, would you stay on that side?

A. That depends. If I wanted to give a signal and I could see them I would.

Q. Suppose you did not think there was any danger and you could give a signal, would you stay on that side?

A. Yes, sir; if I could give a signal on that side; yes, sir.

133 STEVENS recalled for defendant.

Q. I think you have already testified that you have had experience in working in yards?

A. Yes, sir.

Q. What do you say as to the relative danger in coupling cars on a curve between the inside and the outside of a curve?

Objected to as incompetent.

[A.]. ——.

Q. Doing this express work?

Objected to for the reason that he is not a coupler, but an engineer. Objection overruled. Exception for plaintiff.

A. Well, I think that the man had no business going in on that side of the curve at all.

Mr. BAKER: That is objected to, and I move to strike out the answer as a mere opinion of the witness.

Motion not passed upon.

134 MICHAEL GRIFFIN sworn for the defendant.

Examined by Mr. MEDDAUGH:

Q. You are the proprietor of the Wabash hotel?

A. Yes, sir.

Q. Situated at the foot of Brush St., near the depot?

A. Yes, sir.

Q. What depot?

A. Brush St. depot.

Q. Did you know Orson Tuttle in his life-time?

A. I did; yes, sir; for a short time.

Q. How long?

A. I can tell by looking at those books.

Q. Are these your books? (Books handed to the witness.)

A. Yes, sir.

Q. Consult them, and state when he came to your house.

A. He came on the 13th day of October of last year.

Q. 1882?

A. Yes, sir.

Q. Did he come alone?

A. No, he came with his wife, as he represented her at that time. I find on the register of that day, the 13th of October, that he and his wife came there.

Q. Did they take a room at your house?

A. Yes, sir.

Q. How long did they remain there?

135 A. They remained from then until the day he was killed.

Q. During that time did they occupy the same room?

A. They did, sir.

Q. They were occupying the room the same as regular boarders?

A. Yes, sir.

Q. Did he pay the board of this party?

A. Yes, sir, except $10.10 that he owed after he was killed, and that was paid through Mr. Morgan, or somebody that came from his wife, as I then understood it, when I found out that it was not his wife at this time.

Q. Are either one of the ladies present in the court-room the woman who was called his wife?

A. No, sir; it was neither of those ladies; she was almost as big again as either of those ladies.

Q. You had not known him before?

A. The day previous he came there to arrange for the board of himself and wife, and he asked me what I would charge him. He

said he was running on the Lake Shore road, and a part of the time he would be on the Lake Shore road, and that his wife would want the same room when he was in there. We keep tickets for men that are not in all the time, and I sold him a ticket in the first place, and those he paid for, and he paid for the board of his wife up to that time as well, and then he quit and went to work in the Milwaukee yard.

Q. Still remaining at your house with his wife?

A. Yes, sir.

136 Cross-examination [by] Mr. BAKER:

Q. Did you know this woman he brought with him as his wife?

A. No, sir.

Q. Do you know who she is now?

A. I don't know where she is.

Q. Do you know her or recognize her now as some other person? What I want to know is whether you know who she is.

A. I would know her if I saw her.

Q. You don't know her name?

A. No, sir; no more than she was Mrs. Tuttle.

Q. She had a room there?

A. Yes, sir.

Q. Did she stay at the house during all the time he boarded there?

A. Yes, sir.

Q. Did she do any work there?

A. Yes, sir. After the second week, I think it was, she wanted—she said the time felt so long to her she felt that she would do a little work; so Mrs. Griffin let her go into the dining-room and work a few days, and she got tired of that, and I believe it was three or four days she had been working when he was killed in the yard. By the enquiries of the coroner I found out that she was not married to him; that she calculated to be married to him, and then I told her to pack up and get out.

Q. Never mind what she told you; never mind that.

137 A. They were there from the 13th to the 31st; she was there until the 30th; I believe that was the day he was killed.

Q. Was he brought to the house the day he was killed?

A. No, sir; he was not. I saw him up in the yard in a little shanty.

Q. Is the woman at your house yet?

A. No; she left there at that time.

Q. But the balance of the board bill was subsequently paid by some of his people from Indiana?

A. There was $6.10 paid by a young man Mrs. Tuttle sent.

Q. Have you ever seen that woman since—the woman that was at your house?

A. No, sir; I have not; not since that day.

Q. Did she work in your chamber for a time as a chamber-maid?

A. No, sir; she did not.

Q. You keep a place where railroad men board?

A. Yes, sir; if they behave themselves.

Q. Whereabouts is your place situated?

A. On the northwest corner of Brush and Atwater; right in front of the depot.

Q. What did you charge Tuttle for board?

A. He paid $5.00 for tickets; that would be at the rate of 25 cents a meal and 25 cents for a room.

Q. 25 cents a night for a room?

A. No; he was to pay $5.00 a week for her board and pay for the tickets extra.

Q. She was to have a room and board for $5.00?

A. Yes, sir; and he was privileged to take tickets and just pay 25c. for his meals and nothing for the room, just because it was his wife.

138 HERMAN N. COFFINBURY sworn for defendant.

Q. What is your business?

A. At present trainmaster of the third and fourth divisions of the Wabash road.

Q. How long have you been in that employment?

A. For the last 3 or 4 years.

Q. Prior to that time what was your business?

A. Yardmaster.

Q. Where?

A. At Fort Wayne, Indiana.

Q. For the Pittsburg & Fort Wayne company?

A. No, sir; the Wabash company.

Q. How long were you there in their service as yard master?

A. I was there for about three years.

Q. What were the wages per day or per month of brakemen on freight trains of the Wabash company a year ago?

Mr. BAKER: I object as to what the wages were worth for the purpose of saving the point.

[A.] ——.

Q. What was paid?

Same objection. Obj. overruled. Exception.

Q. The wages on most all roads, and on the Wabash especially, of freight men ran by the trip. For instance, for a division of 100 miles, or of 120 miles, they get $1.80 a day; running the train over the road one way is called a trip, and they receive $1.80. They generally calculate to make from 26 to 30 days in a month; sometimes they run over that, 32 to 33 days.

139 Q. What wages would they average?

A. $50.00 to $55.00 a month.

Q. And that has been the case on the Wabash how long?

A. For the last ten years?

Q. How do those wages correspond with the wages paid by the Baltimore & Ohio road during that period for like service?

A. The Baltimore & Ohio has not paid quite as large wages; their runs are a little longer and they get the same price as the Wabash pays for a shorter run, making 25 to 30 days. They will run from

$45.00 to $50.00 a month. Taking the year through they will average $550.00 to $600.00 a year.

Defendant rests.

140 The plaintiff further introduced testimony showing that before this suit was commenced she was appointed administratrix of the estate of her deceased husband by the circuit court for the county of De Kalb, in the State of Indiana. The original of the Exhibits A, B, & C, referred to in this bill of exceptions are hereunto annexed and made a part hereof.

Plaintiff rests.

The foregoing is all the evidence introduced on the trial of this cause.

The counsel for the defendant requested the court to instruct the jury to find a verdict for the defendant.

The counsel for the plaintiff requested the court to give the following instructions to the jury:

Plaintiff's Requests.

I.

If the jury find that the defendant constructed "boot-jack siding" with so sharp a curve that the draw-heads of the cars in use by the defendant would pass each other if an attempt was made to make a coupling on said curve; that there was no necessity or exigency requiring so sharp a curve; that the civil engineer of the defendant laid out a curve with a radius of 180 feet, but the workmen of the company in constructing said siding carelessly and negligently so laid the track that connected with a straight part thereof — there was a curve with a radius of only 98.82 feet; that by reason of
141 such negligent construction the draw-heads of the cars in use by the defendant would pass each other on a portion of said siding; that Orson Tuttle, the deceased, was put to work on this siding by the defendant without his being informed or knowing of its negligent construction, and that while engaged in making a coupling on said siding he was killed by the passing of the draw-heads, as stated, then the plaintiff is entitled to recover, unless the jury should find that said Orson Tuttle was guilty of contributory negligence.

II.

The only claim of contributory negligence made by the counsel for the defendant is that Tuttle undertook to make the coupling while he was on the inside instead of the outside of the curve.

III.

If the jury find that the curves usually and ordinarily found in railroad yards and in the yard of the defendant are not so sharp as to cause the draw-heads to pass each other; that upon the curves usually and ordinarily found in yards it is safe and customary for the coupler to stand on the inside of the curve; that Tuttle had no

reason to believe that a portion of this curve was unusually and extraordinarily sharp or that the draw-heads would pass each other on a portion of it; that he attempted in the usual and customary manner to couple the two cars in question; that he made a first and a second attempt at points on the track where the draw-heads would not pass, and that without any notice or knowledge that the cars
142 had reached a place in the track, or that there was a place in the track, where the draw-heads would pass he made a third attempt to make the coupling, and thereupon the draw-heads passed each other and he was killed, then the jury will be warranted in finding that he was not guilty of contributory negligence.

IV.

There is no evidence in the case that Tuttle had been informed by the company, or otherwise knew, that the draw-heads would pass each other on any portion of this siding.

V.

While Tuttle was bound to notice and observe that he was working on a sharp curve and to guard himself against any increased danger that was thereby made apparent to him, or which could have been observed by a prudent and careful man, still it cannot be said that he was bound to observe or notice that the curve was so very sharp that the draw-heads would pass.

VI.

If the jury find that Tuttle had no notice or knowledge of the fact that the draw-heads would pass on a portion of this siding, and that the fact itself would not be noticed or discovered by a careful and prudent man while engaged in coupling cars on said
143 siding, then it cannot be said that he was guilty of contributory negligence, unless it had already come to his knowledge that the draw-heads would pass.

VII.

If the jury find that the fact that the draw-heads would pass each other on a portion of this siding was not discoverable except by a practical demonstration or the use of instruments, then Tuttle was not guilty of contributory negligence, unless it had already come to his knowledge that the draw-heads would pass.

VIII.

Tuttle, before making the third and fatal attempt to couple the cars in question, was not bound to presume that the company had been negligent in the construction of the siding, and that he had reached a point thereon where the draw-heads would pass each other. On the contrary, he had a right to rely upon the promise or obligation of the company, implied in his contract of employment, that the tracks upon which he would be set to work would be properly constructed and laid.

IX.

If the jury find that it is necessary in coupling cars on a curve for the coupler to be on the inside, so he can signal the engineer or fireman, or either of them, and that Tuttle was on the inside of the curve for that purpose, then he was not guilty of contributory negligence in attempting to make the coupling on that side.

144 X.

Under the evidence in this case it is for the jury, and not for the court, to say whether or not the deceased was guilty of contributory negligence.

XI.

This action is brought by the administratrix of the estate of Orson Tuttle for the benefit of his widow and children, under the provision of a Michigan statute authorizing such actions (2 C. L., 1871, p. 1882, 1 sess. laws, 1873, p 127).

XII.

In this action the jury should give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from the death of Orson Tuttle to his wife and children.

145 *Charge of the Court.*

The elementary rules which govern actions of this kind are very simple; the difficulty is in the application of those rules. To entitle the plaintiff to a verdict it is necessary to prove, first, some negligence on the part of the defendant, and, in the second place, a want of negligence on the part of the deceased. If there is conflicting evidence with regard to the negligence of the defendant, it is the duty of the court to submit the matter to the jury. So, if there be conflicting evidence with regard to the contributory negligence of the plaintiff, it is also the duty of the court to submit it to
146 the jury. So, if from the undisputed facts fair-minded and intelligent men can properly draw different inferences as to the negligence or want of negligence, then it is the duty of the court to submit it to the jury. It is only where the court is satisfied that there is no negligence on the part of the defendant, or that there is, upon the plaintiff's own showing, contributory negligence on the part of the plaintiff, that we are authorized to direct a verdict; and it is frequently very difficult to determine whether such a case ought to be submitted to you or not. Our sympathies—the sympathies of all of us—go out toward the person who receives the injury, or toward his family, if he be dead; and yet we cannot permit that to bias our judgments in passing upon the merits of the case.

Coming now to the facts of this case, the first question is whether there was negligence on the part of the defendant. The negligence relied upon was in the fact that there was a very short curve in the track where this accident occurred. Now, in view of the difficulties of getting around in a railway yard, the curves are frequently

obliged to be much shorter than they are upon the open field, where trains are running at full speed; and I would not say that the defendant was guilty of negligence in having a curve as short as it chose to have it, if it was as long as the circumstances of the case permitted. Now, if the curve in this case could only have been built upon a radius of 98 feet, I should not have held it was negligence on the part of the defendant to have built it as short as that. It would only become the duty of those using the curve to apprise themselves of
147 the fact, and use extra caution, or, perhaps, of the railroad company to notify them of the curve. In this case there was evidence tending to show that the engineer of the company laid out a curve with a radius of 180 feet, but that in the laying down of the rails, or in repairing the rails, the radius was changed in a portion of the curve to one of about 98 feet. Did the case turn wholly upon that, I should have felt it my duty to submit the question to the jury as to whether there was not negligence on the part of the defendant in making that curve with a shorter radius than the circumstances of the case required. I suppose that every one of us would concede that in the open country a curve should be made large enough to enable trains to pass at the usual speed and with safety, and if these curves, instead of being made with a radius of 600 feet, were made with a radius of 300 feet, and thereby the train was thrown off the track and the passengers injured, I should say it would be a question of fact whether there was not negligence in laying so short a curve, and I take the same view with reference to the curves in this yard, so far as that is concerned. The railroad company had the right to lay just as short a curve as they chose to, provided it was necessary to lay a short curve; but when they came to lay the curve they should give it as much radius as the character of the ground and the other circumstances of the case would permit. In this case, as I said before, there is evidence that they did not give it as much as the engineer of the road (who is supposed to be an expert in that particular) allowed, and I think there is evidence in that particular to go to the jury.

148 But the more serious question in this case is as to the contributory negligence of the plaintiff. Indeed in this class of cases it is usually the most serious question. The general rule is where a man is employed in a particular work, in a dangerous work, that he takes upon himself the risks of the employment. He is not bound to accept a dangerous employment, but if he does he takes the risks ordinarily incident to that employment. A man who is employed in a powder-mill takes the risks of being blown up, and the risk is a much greater one, of course, than if he were employed to plough a field. There is one thing which enters into the contract of every man who contracts to do any kind of work—that is, the risks of his employment are one of the circumstances to be considered by him before taking the employment. He not only takes the risks of his employment, but takes the risks of the negligence of his fellow-servants. In taking those risks he is bound to exercise some forethought for himself. He is bound to be prudent. He is bound to have those risks in contemplation.

Suppose, for instance, a powder-maker were employed to work in a powder-mill. If he wore steel nails in the heels of his shoes he would probably learn that it was a mistake very soon. It would be his duty to wear such covering for his feet as would prevent a spark from igniting. So when a man couples cars it is his duty to exercise all such forethought and prudence as an intelligent man ought to exercise under those circumstances. Now, the only serious question in my mind in this case is whether the plaintiff's intestate did exercise the requisite prudence. There is evidence that it is the custom on ordinary curves (I don't know whether it extended to such
149 short curves as this), but it is in evidence that it is the custom on ordinary curves for the coupler to couple cars from the inside of the curve, and not on the outside. But custom does not make it prudent, because there is scarcely a day in the year, I suppose, but that some car-coupler or brakeman in this city does not take risks which no prudent man ought to take, and in nine hundred and ninety-nine cases out of a thousand he escapes injury and thereby is led to repeat the thing, until finally a time comes when he is crushed to death, or his hand is crushed, or some other accident occurs to him, and he or his representatives calls upon the railroad company to respond.

Now, the curve in this case was a very short one, and on that account two men had been sent out, one to pass word to the other and the other to the engineer, not expecting that the word would be passed directly from the plaintiff's intestate to the engineer, because there seems to have been a house in the way, or it seems it was considered dangerous at that point; at any rate, we may be pretty sure that the railroad would not have employed three men to couple those cars if one was sufficient. The very fact that two men were sent to help him to pass the word to the engineer to forge ahead or to back up is evidence of itself that it was considered a dangerous piece of business to couple cars at that point. Deceased did try it twice and failed. Upon so short a curve there was danger of the draw-bars slipping. In such event there was absolute safety upon one side, and upon the other an almost certainty of death or injury. It was the clear duty of the deceased to choose the
150 safer side. He knew, as he was an experienced man, that draw-bars do slip sometimes, even upon a straight track, as it has been testified to, and the sharper the curve the greater was the danger of their slipping. It seems to me, and I can come to no other conclusion in this case, that the plaintiff wantonly assumed the risk of remaining upon the inside of the draw-bar when he should have gone to the other side, and that the railroad ought not to be held in this action; and, gentlemen of the jury, I shall therefore direct a verdict for the defendant upon the ground that the plaintiff's testimony and all the testimony in this case is inconsistent with the idea that plaintiff's intestate exercised ordinary care in coupling these cars It is also a serious question in this case whether, conceding that the defendant was negligent in the construction of this track, the deceased was not chargeable with notice of the defect, and assumed the danger as one of the risks of

his employment; but, as the case can be disposed of upon other grounds, I express no opinion upon the point.

Mr. BAKER: If the court please, before the verdict is taken I desire to except to the refusal of your honor to give the requests presented by the plaintiff, and I except to the refusal of each request. I also desire to except to the instruction of the court directing a verdict for the defendant.

COURT: That covers every possible point.

Mr. BAKER: I desire, however, your honor, to state it a little more specifically. I also desire to except upon the ground that the facts stated by the court are not the facts that appear in evidence, and especially to except to the decision of the court upon the fact that two men had been sent out as couplers to pass the signal, and that this fact that two men were sent out was evidence that it was dangerous to make a coupling on the inside of this curve or at this point.

151 Mr. MEDDAUGH: I do not understand that to be the instruction to the jury; that is your honor's inference.

Mr. BAKER: That is the direction of the court. I desire to put upon record somewhat the ground of my exceptions. I except to the statement of facts in regard to the helpers and the signals, on the ground that the testimony shows that these helpers were used upon all tracks in that yard, and were not sent out with reference to sharply-curved tracks merely. I also except to the conclusion of your honor upon the fact that (as your honor said) the plaintiff (although I suppose your honor meant the plaintiff's intestate) wantonly remained inside, on the ground that there is no evidence of that kind upon his part. I also object to your honor withdrawing testimony upon which the jury would be authorized to find a different state of facts than those stated by your honor in this opinion.

COURT: I should be very glad if you should make a motion for a new trial in this case. If I should adhere to the opinion I have expressed, the case is a proper one to take to the Supreme Court of the United States. Very few cases of this kind have gone to the Supreme Court of the United States.

152 This bill of exceptions is allowed, settled, and signed at the request of the counsel for the plaintiff on this the 15th day of September, 1883.

HENRY B. BROWN, [SEAL.]
District Judge.

(Here follow diagrams marked pp. 153, 154, 155.)

156 [Endorsed:] No. 6835. Circuit court of the United States for the eastern district of Michigan. Lizzie Tuttle, adm'x, *vs.* The Detroit, Grand Haven and Milwaukee Railway Co. Bill of exceptions. Filed in clerk's office September 18th, 1883. Jno. Graves, dep. cl'k. Herschel Whitaker, U. S. commissioner.

157 THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error issued out by the plaintiff in the case of Lizzie Tuttle, adm'x, plaintiff, *vs.* The Detroit, Grand Haven and Milwaukee Railway Company, defendant, that the above and foregoing are true copies of the declaration, with proof of service, plea, and record of trial and judgment entered by said court in said cause, as appears of record in my office; that I have compared the same with the originals, and they are true and correct — therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this ninth day of October, in the year one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: E. Michigan C. C. U. S. No. 186. Lizzie Tuttle, administratrix of Orson Tuttle, deceased, plaintiff in error, *vs.* The Detroit, Grand Haven and Milwaukee Railway Company. Filed 22nd October, 1883.

122, 107.

122, 189

United States of America.

SUPREME COURT.

January Term, 1887.

LIZZIE TUTTLE,
Adm'x of the Estate of
ORSON TUTTLE, deceased,
Plaintiff in Error,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.,
Defendant in Error.

Brief for Plaintiff in Error.

O. M. SPRINGER.
Attorney for Plaintiff in Error.

F. A. BAKER.
Of Counsel.

DETROIT
Potter Printing Co., 47 Buhl Block.
1887

United States of America.

SUPREME COURT

LIZZIE TUTTLE,
Adm'x of the Estate of
ORSON TUTTLE, deceased,
Plaintiff in Error,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action for negligence resulting in the death of Orson Tuttle, a brakeman in the employ of the defendant.

The suit is brought under the Michigan statute, vesting the action in the personal representatives of the deceased.

2 How. Stat. of Mich., p. 2050.

The defendant has a yard in the city of Detroit, consisting of a large number of switches and side tracks or sidings, on which freight cars are moved and trains made up. (Exhibit "C," R., p. 80.)

Mr. Tuttle was employed in this yard as a brakeman and coupler, and was killed while attempting to couple two freight cars on the side track running to the boat slip on the Detroit river, and known to the men in the yard as "Boot Jack Siding."

The negligence relied on is that of having and maintaining an improperly constructed and defective track. The declaration contains three counts, but the second which merely alleges that the cars were of defective construction was abandoned on the trial. (R., p. 58, fol. 105.)

The first and third counts allege that boot jack siding was negligently and unskillfully constructed by the defendant, with so sharp a curve that the draw heads of the cars in use by it would pass each other and cause the cars to crush anyone who attempted to make a coupling thereon. (R., pp. 9 and 11; fol. 14, 15.)

THE DEFECTIVE TRACK.

The testimony of Mr. Geo. Masson, the defendant's chief engineer, shows that he staked out this siding with a radius of 180 feet, and that it is perfectly practical to maintain a curve there with such a radius. (R., p. 61; fol. 110, 111.)

Mr. Thomas Campau, called by the plaintiff, and who made a survey of the track as it was in point of fact, testified that connected with a straight part of the track was a curve with a radius of only 98 feet 10

inches, and that there is a space of 10 or 12 feet in the track where the draw heads will inevitably pass each other. (R., pp. 33, 36; fol. 55, 61, 62.)

William Braithwaite, who helped Mr. Campau survey this siding, testified that Exhibit "B," is a correct diagram or survey of that track. (R., pp. 56, 57; fol. 103.)

Exhibit "C," was produced by the defendant, and the radius of the curve in question is marked thereon in red ink as 180 1-2 feet. (R., p. 64; fol. 116; p. 80.)

But the testimony of Mr. Masson, shows that Mr. Campau was correct in testifying that the actual radius was only 98 feet 10 inches.

Mr. Masson's testimony as to the construction and condition of the track was as follows:

"Q. What is the smallest radius you have got in that yard?

A. To-day.

Q. Yes, sir.

A. There are curves of 200 feet radius. This was put in for 180 feet and there are curves of 200.

Q. This is the shortest one in the yard isn't it?

A. I think very likely.

Court. What is the radius of this?

A. 180; but the rails are straight in the curves; they are about 30 feet long, and the curve is made up of these chords, the length of the rail. I gave my track foreman the length of the curve, but he may not have followed it exactly. I staked it out for a 180 feet radius. Cars, of course, have been off the track at different times. The track was kept up by the track foreman. It might vary for the length of

25 feet, perhaps; but that it was a shorter curve for a distance of 25 feet of it I would not dispute.

Mr. Baker. That is, you laid out this general curve, or staked it out, and then it is the track men who lay the track and adjust the rails to your survey?

A. That is it exactly. It was all right in the first place, but, of course, in a railroad yard a car will get off the track sometimes, and the track is disturbed; so, as I say, for the length of 30 feet it may show a different radius from what I say, but the intention was 180 feet." (R., p. 61.)

"*Court.* Then the workmen did not build this track according to your plan?

A. Yes, sir; it was built according to the six stakes I gave them at the time, but it has been in constant use, and worked and shifted about for them to load the timber; the object of the track was to get to the slip with lumber.

Q. It changed the radius then?

A. Yes, sir; it has changed in one way, but I would like to explain that it has not changed in any way to affect the working of the track; that the difference between that and 180 is practically no difference, so far as the wheels are concerned." (R., pp. 63, 64.)

On further examination by Mr. Meddaugh, one of the counsel for the defendant, the witness testified that "as between a 100 foot radius and a 180 foot radius there would be no practical difference in so far as the tracking of the wheels was concerned; both would require a guard rail, and the same precaution and care would be required to be used whether the radius was 100 feet or 180 feet." (R., p. 65; fol. 118.)

It will be observed that the witness is very careful to limit or confine his testimony to the mere question, whether or not, the wheels would follow the track.

He does not deny, (nor does any other witness,) that the track, as it actually existed at the time Mr. Tuttle was killed, was defective and out of repair, and the rails so far from their proper place or adjustment, that the draw-heads of the cars in use by defendant, would pass each other at the point where Mr. Tuttle was killed.

Henry D. Ludden, who had had 20 years of experience as an engineer in railroad building, testified:

"Q. Will you state what is the usual radius that would be used in laying curves—about how short a radius would ordinarily be used?

A. On main tracks generally about 700 or 800 feet, or on turnouts.

Q. What would be the usual radius in a yard—say for side tracks?

A. That would depend a great deal upon circumstances.

Q. Well, sir; stating a case, suppose a side track is laid in a yard, and the first curve from the tangent, I believe you call it, or straight line, has a radius of 98.80 feet throughout—would that be a very sharp curve?

A. Yes, sir.

Q. Would it be an unusually sharp curve?

A. I should think it would; yes, sir; the radius as ordinarily used in engineering, is half the diameter of the circle.

Q. So that in a railroad laid upon a radius of

98.80 feet, if the curve was continued, you would have a railroad running upon a circle with a diameter of less than 200 feet?

A. Yes, sir.

Q Well, that would be a rather remarkable railroad would it not?

A. If it was carried out to any extent it would be." (R., p. 43, fol. 75 and 76.)

Harlow P. Davock, another civil engineer, testified that it would not be good engineering, a good practice to lay a curve in a yard that left a tangent or straight line, with a radius of only 98.80 feet. (R., p. 51, fol. 91.)

On cross-examination of this witness, counsel for defendant, in asking a question made an admission, viz:

"*Mr. Meddaugh*: You think such a curve as Mr. Baker has spoken of was an unreasonable curve. So would I. Of course we all agree about that. We would have admitted it long ago if our friends had asked us to; now, witness, etc." (R., p. 51, fol. 92.)

THE ACCIDENT.

James Keith, who saw the accident, testified, that Exhibit "A" was a representation of the two cars, and "about the way the draw bars were when he, (Tuttle,) got squeezed." (R., p. 29, fol. 48.) Exhibit "A." (R., p. 81.)

Orson Tuttle had been working as a brakeman, for some years, (R., p. 52, fol. 95,) and was "a good, careful coupler." (R., p. 18, fol. 28.) But he had only been employed in the defendant's yard for six or eight days. (R., p. 18, fol. 27; p. 22, fol. 34.)

A number of cars were standing on boot jack siding, and James Keith, the yardman in charge, went upon this siding with an engine, which was in charge of Henry E. Stevens, as engineer, and Henry J. Lovett as fireman. In addition to these three there were two brakemen or couplers, viz: Thomas McDermott and Orson Tuttle, the deceased.

They went to take out one of the cars on this siding, and Mr. Tuttle, while attempting to make the coupling, was crushed and killed. He was caught between the cars because the track was so constructed, that the draw-heads were thrown out of line, and passed each other, allowing the corners of the cars on the inside of the curve to come together. Tuttle went between the approaching cars to adjust the link and insert the pin at the moment the drawheads came together, but, instead of meeting or striking each other, and receiving the concussion, they passed by, and the full force of the moving car was expended on Tuttle's body, causing him to die within an hour. Mr. Keith, Mr. Stevens and Mr. Lovett were sworn, and testified to the circumstances of the accident, and their testimony is set forth in full in the bill of exceptions. (R., pp. 15 to 29; pp. 29 to 32; pp. 39, 40; pp. 44 to 49.)

There being no dispute between the parties as to how the accident occurred, it is not necessary to summarize the testimony of these witnesses. We will simply call attention to certain points of the testimony, which we consider of importance.

1. Two, and perhaps three, attempts were made to make the coupling, before the fatal attempt, and at these prior or first attempts, the draw-heads met, and

Mr. Tuttle endeavored to adjust the link and pin, and stepped from between the cars with entire safety. It was not until the car they were trying to couple to, had worked back to the defective place in the track, that the draw-heads passed each other and caused the cars to crush Mr. Tuttle. (R., p. 16, fol. 22; p. 22, fol. 34; p. 23 fol. 38.)

2. Mr. Tuttle had only been employed in the yard about a week, and had never before made a coupling on this track. (R., p. 21, fol. 34.)

He, therefore, had no reason to believe that the track was defective or dangerous.

3. James Keith was Mr. Tuttle's superior officer, that is, he was the yard man who was in command of the crew, and gave directions to the engineer, and to Mr. McDermott and Mr. Tuttle, the two helpers under him. Mr. Keith testifies that he had seen draw heads pass at this place on the track before, but that he did not inform Tuttle of the fact, nor did he inform any one else in the yard. (R., p. 27, fol. 44, 45.)

4. There was nothing in the appearance of the draw bars that indicated that they were out of repair, or that there was anything wrong with them. (R., p. 49, fol. 86.) The accident was caused by a defective track, and not by defective draw-bars.

CONTRIBUTORY NEGLIGENCE.

The testimony bearing on the question of contributory negligence presents a question of fact.

The defendant claims that Mr. Tuttle was guilty of contributory negligence, because he attempted to make the coupling from the inside of the curve, which was obviously more dangerous than the outside of the

curve, and it is therefore necessary to examine the testimony on this branch of the case with considerable care.

The plaintiff called Alvin Hall, Edmund Barber and William Cipher, each of whom had had years of experience as a brakeman, and it appears from their testimony, that the inside of the curve is the proper side for a brakeman or coupler to stand in making a coupling on a curve, and that the reason for working on that side is to enable the coupler to see, and be seen by the engineer or fireman, and to give the necessary signals.

Alvin Hall testified:

"Q. Now, I desire to ask you, in coupling cars upon a curve, which side is the proper side for a brakeman or coupler to stand?

A. On the inside of the curve.

Q. Is that usually the side upon which old and experienced brakemen stand; is there any reason why it is customary to go on that side?

A. Yes, sir; on account of the fireman or engineer seeing the signals.

Q. So you can see the fireman and engineer, and signal backwards and forwards?

A. Yes, sir.

Q. If you are on the other side you cannot see the signals?

A. It is a very difficult job to see the engineer or fireman.

Q. So that, as I understand you, it is the usual and ordinary thing to be on the inside of the curve?

A. Yes, sir." (R., p. 41, fol. 70, 71.)

Edmund Barber, testified:

"Q. Will you inform us, in coupling cars upon a curve, which is the proper side for a coupler or brakeman to be?

A. On the inside of the curve.

Q. Is that the usual custom or practice among old and experienced brakemen?

A. Yes, sir.

Q. Is there any reason for their being on that side?

A. Why, yes; in order to give the signal to the engineer and fireman; you can not see them from the other side." (R., pp. 41, 42, fol. 72.)

William Cipher testified:

"Q. Will you state what the usual and ordinary practice is among experienced brakemen in coupling cars upon a curved track—as to which side of the track the brakeman would stand?

A. Well, I always coupled them on the inside of the curve?

Q. Have you seen other brakemen work?

A. Yes, sir; I have.

Q. What is the usual practice as to that?

A. I have always seen them do the same thing.

Q. Is there any reason for it?

A. Yes, sir; there is; the fireman can see you.

Q. So the fireman can see you?

A. Yes, sir.

Q. What occasion is there for the fireman seeing you?

A. If you were on the outside no one could see you make a coupling.

Q. Could not give the signals do you mean?

A. Yes, sir; no one could see you.

Q. Suppose you fell down?

A. You would get run over then, or get killed; one of the two.

Q. That is, as I understand you, you would stand on the inside of the curve so the engineer and fireman could see you?

A. Yes, sir; that is the way I always made a coupling; that is the way I have seen them made.

Q. And it serves two purposes, to make the signals, and in case of accident it protects you?

A. Yes, sir." (R., pp. 49, 50, fol. 89.)

The counter testimony is not very full or convincing.

James Keith, was called by the plaintiff to prove the accident, and when cross-examined by Mr. Russell, one of the counsel for the defendant, testified:

"*Mr. Russell:* Would he not have been absolutely safer on the other side of those cars in coupling those cars, than if that had been a perfectly straight track?

A. Yes, sir; he would have had more room.

Q. He could not possibly have been hurt.

A. No; it would make no difference what gave way.

Q. Was there anything in the world to prevent his coupling those cars on the other side?

A. No; there was nothing to prevent his standing on that side of the car." (R., p. 20, fol. 31.)

On his re-direct-examination by counsel, for plaintiff, witness testified as follows:

"Q. It is a usual thing among brakesmen and

couplers to couple on the inside of the curve—is it not?

A. It is not.

Q. Where a brakeman is making a coupling, and there is no one to signal, he has to be on that side—hasn't he?

A. Well, there is no train but what there is somebody to give the signal.

Q. Do you mean to say it is an unusual thing for a coupler to be on the inside of a curve?

A. I do, sir.

Q. Did you give Tuttle any directions as to that when he came into the yard?

A. I didn't; I should think I would insult a man to say that to him.

Q. There was at least one experienced man then that was used to go on the inside of the curve?

A. No, sir; there is no doubt but what plenty of men make couplings on the inside of the curve.

Q. They do it every day?

A. I suppose they do." (R., p. 26, fol. 42.)

Edmund Barber, one of the brakemen called by the plaintiff, testified that he had worked in this yard in company with Keith, and knew his manner of working; that Keith "coupled as many on the inside as he has out, in that yard, and more too." (R., p. 44, fol. 78.)

This testimony was first admitted, but immediately after was struck out on the ground that Keith being plaintiff's own witness could not be impeached by her. (R., p. 45, fol. 79)

Mr. Keith, was afterwards called as a witness for the defendant, and testified that the "practice is to take the outside of the curve." (R., p. 69, fol. 126.)

On cross-examination, he testified that he had coupled cars on the inside of a curve, but not on a curve as sharp as this one.

"Q. But usually, where the curve is not very sharp, you stay on the inside of the curve?

A. It depends on which end of the yard we are working in, but where there is a gradual curve there is no danger in coupling on the other side." (R., p. 70; fol. 127.)

Jas. E. Brody, the yard master of the defendant, testified, that the proper method is to work on the outside of the curve for the purpose of preventing an accident if the draw bars should happen to pass.

"Q. What do you say as to the custom of coupling cars on a curve; whether the coupling should be made on the inside or the outside?

A. A man can couple a car easy enough on a small curve, but I should think on a big curve it showed poor judgment for a man to get on the inside on the curve, on a big curve, on a sharp curve like that down there." (R., p. 70; fol. 129; p. 71; fol. 130.)

On cross-examination, he testified, that on ordinary curves he would work on either side, whichever side he had commenced working on.

"Q. Suppose you commenced to work on the outside of a curve, would you stay on that side of the curve?

A. Not if I thought there was any danger.

Q. Suppose you commenced to work on the in-

side of a curve, and you didn't think there was any danger, would you stay on that side?

A. That depends. If I wanted to give a signal and I could see them, I would.

Q. Suppose you did not think there was any danger, and you could give a signal, would you stay on that side?

A. Yes, sir; if I could give a signal on that side; yes, sir." (R., p. 71; fol. 131; p. 72, fol 132.)

Henry E. Stevens, the engineer, recalled for defendant testified:

"Q. What do you say as to the relative danger in coupling cars on a curve between the inside and outside of a curve? * * * *

A. Well, I think that the man had no business going on that side of the curve at all." (R., p. 72, fol. 133.)

We have now referred to all the direct testimony bearing on the question whether Mr. Tuttle was guilty of contributory negligence in working on the inside of the curve.

In conclusion, however, we desire to call attention to one or two trifling, but quite significant points of fact that appear in the testimony of Jas. Keith, the yardman in charge of the crew, and of Henry E. Stevens, the engineer, when they were giving the circumstances of the accident.

The theory of the defense is, that Tuttle should have worked on the outside of the curve, and passed the necessary signals through McDermott, the other helper, or Keith, to the engineer.

But it appears that when Tuttle commenced to make this coupling, and made the first and second,

but unsuccessful attempts, he gave the signals directly to the engineer.

We find the following in Keith's testimony:

"Q. Were you close to him when he made this coupling and failed?

A. I was not.

Q. When he commenced to make the coupling you were up towards the engine?

A. Yes, sir; up that way.

Q. About how near the engine—half way up?

A. He walked back, and I got off the engine, and lit my pipe, and I walked along slow.

Q. Well, when he commenced?

A. When he commenced I was up where my other helper was.

Q. Then you noticed them slack back twice?

A. Yes, sir." (R., p. 23, fol. 37, 38.)

"Q. Do you mean to testify that when these two unsuccessful couplings were attempted the signals to slack back were given by you?

A. No; the last one as I was going down; the first one he hollered himself.

Q. And the second one he hollered himself?

A. Yes, sir; and I hollered again to slack back.

Q. And then when you come to make the third coupling—

A. I was talking to him." (R., p. 25, fol. 41.)

Mr. Stevens, the engineer, testified, that he was looking out of the cab when Tuttle was trying to make this coupling, and that he was looking out to see Tuttle if he could, but his view was obstructed by a shanty and a pile of staves. (R., pp. 30, 31; fol. 51, 52.)

This testimony indicates that when the crew rode down on the engine, to Boot Jack siding, Mr. Tuttle got off on the inside of the curve, and walked along the side of the train to make the coupling; that the engineer was looking out of that side of the cab to watch Tuttle, and that neither Keith or McDermott went down the track on the other side for the purpose of passing signals, at least, until after the two unsuccessful attempts were made; that the signals for the first and second attempts were given by Tuttle, and if at those or the third and fatal attempt, any signals were passed by Keith or McDermott, it was because the shanty or pile of staves obstructed the view between Tuttle and the engineer, and not because it was the ordinary and usual practice to couple from the outside of the curve, nor because anyone expected that Tuttle would work from that side.

The acts of the crew in doing this work show, that the inside of the curve was the proper side to couple from. It is reasonable to believe that if the curve had ran in the other direction, McDermott, the other coupler, would have done the work, as one evidently worked on one side, and one on the other, and the one who was on the inside being expected to do the coupling whenever they were at work on a curve.

We have now made a full statement of the evidence in this case, except that bearing on the question of damages, which is not material on this hearing. At the close of the evidence the counsel for the defendant requested the court to direct the jury to find a verdict for the defendant, and the counsel for the plaintiff presented a number of requests to charge, submitting the case to the jury. (R., p. 76.)

The learned district judge then delivered a charge in which he held:

1. That there was evidence that the defendant was negligent in the construction and repairing of the track. (R., pp. 78, 79, fol. 145, 146, 147.)

2. That Mr. Tuttle was wantonly guilty of contributory negligence, in working on the inside of the curve, and therefore the plaintiff could not recover.

In reaching this conclusion, the court assumed it to be true, that it was not proper for Mr. Tuttle to couple from the inside, and that two men were sent to help him to pass the word to the engineer to forge ahead, or to back. The court was of the opinion that the sending of these men, was "evidence of itself that it was considered a dangerous piece of business to couple cars at that point." (R., pp. 79, 80; fol. 148, 149, 150.)

The court directed a verdict for the defendant, and the counsel for the plaintiff excepted to the ruling, and to the refusal of plaintiff's requests.

Counsel for the plaintiff called the attention of the court to the grounds on which he excepted, as follows:

1. "I also desire to except upon the ground that the facts stated by the court, are not the facts that appear in evidence, and especially to except to the decision of the court, upon the fact that two men had been sent out as couplers, to pass the signal, and that this fact that two men were sent out was evidence that it was dangerous to make a coupling on the inside of the curve or at this point."

2. "I except to the statement of facts, in regard to the helpers and the signals, on the ground that the

testimony shows that these helpers were used upon all tracks in that yard, and were not sent out with reference to sharply curved tracks merely."

3. "I also except to the conclusion of your honor, upon the fact that * * * the plaintiff's intestate wantonly remained inside, on the ground that there is no evidence of that kind upon his part."

4. "I also object to your honor withdrawing testimony upon which the jury would be authorized to find a different state of facts than those stated by your honor in this opinion." (R., p. 81.)

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the plaintiff's intestate was guilty of contributory negligence.

2. The court below erred in refusing the plaintiff's second request, viz:

"The only claim of contributory negligence made by the counsel for the defendant, is that Tuttle undertook to make the coupling while he was on the inside instead of the outside of the curve."

3. The court below erred in refusing the plaintiff's third request, viz:

"If the jury find that the curves usually and ordinarily found in railroad yards, and in the yard of the defendant, are not so sharp as to cause the draw heads to pass each other; that upon the curves usually and ordinarily found in the yards, it is safe and customary for the coupler to stand on the inside of the curve; that Tuttle had no reason to believe that a portion of this curve was unusually and extraordinarily sharp, or that the draw heads would pass each

other on a portion of it; that he attempted in the usual and customary manner to couple the two cars in question; that he made a first and second attempt at points on the track where the draw heads would not pass, and that without any notice or knowledge that the cars had reached a place in the track, or that there was a place in the track where the draw heads would pass, he made a third attempt to made the coupling, and thereupon the draw heads passed each other, and he was killed, then the jury will be warranted in finding that he was not guilty of contributory negligence."

4. The court below erred in refusing the plaintiff's fourth request, viz:

"There is no evidence in the case that Tuttle had been informed by the company, or otherwise knew, that the draw-heads would pass each other on any portion of this siding."

5. The court below erred in refusing the plaintiff's fifth request, viz:

"While Tuttle was bound to notice and observe that he was working on a sharp curve, and to guard himself against any increased danger that was thereby made apparent to him, or which could have been observed by a prudent and careful man, still it cannot be said that he was bound to observe or notice that the curve was so very sharp that the draw-heads would pass."

6. The court below erred in refusing the plaintiff's sixth request, viz:

"If the jury find that Tuttle had no notice or knowledge of the fact that the draw-heads would pass on a portion of this siding, and that the fact itself

would not be noticed or discovered by a careful and prudent man, while engaged in coupling cars on said siding, then it cannot be said that he was guilty of contributory negligence, unless it had already come to his knowledge that the draw-heads would pass."

7. The court below erred in refusing plaintiff's seventh request, viz:

"If the jury find that the fact that the draw-heads would pass each other on a portion of this siding, was not discoverable except by a practical demonstration or the use of instruments, then Tuttle was not guilty of contributory negligence, unless it had alreay come to his knowledge that the draw-heads would pass."

8. The court below erred in refusing the plaintiff's eighth request, viz:

"Tuttle, before making the third and fatal attempt to couple the cars in question, was not bound to presume that the company had been negligent in the construction of the siding, and that he had reached a point therein where the draw-heads would pass each other. On the contrary, he had a right to rely upon the promise or obligation of the company, implied in his contract of employment, that the tracks upon which he would be set to work, would be properly constructed and laid."

9. The court below erred in refusing the plaintiff's ninth request, viz:

"If the jury find that it is necessary, in coupling cars on a curve, for the coupler to be on the inside, so he can signal the engineer or fireman, or either of them, and that Tuttle was on the inside of the curve for that purpose, then he was not guilty of con-

tributory negligence in attempting to make the coupling on that side."

10. The court below erred in refusing the plaintiff's tenth request, viz:

"Under the evidence in this case, it is for the jury, and not for the court, to say whether or not the deceased was guilty of contributory negligence."

11. The court below erred in instructing the jury as follows:

"It seems to me, and I can come to no other conclusion in this case, that the plaintiff wantonly assumed the risk of remaining upon the inside of the draw-bar, when he should have gone to the other side, and that the railroad ought not to be held in this action; and, gentlemen of the jury, I shall therefore direct a verdict for the defendant, upon the ground that the plaintiff's testimony, and all the testimony in this case, is inconsistent with the idea that plaintiff's intestate exercised ordinary care in coupling these cars." (R., p. 80, fol. 150.)

LAW POINTS.

I.

It was the duty of the defendant to construct and keep in repair, a proper, sufficient and safe road-bed and track; and it is liable to an employe for negligence in the performance of this duty.

In the recent case of *Northern Pacific R. R. Co. vs. Herbert*, 116 U. S. 642, this court, in an opinion by

Mr. Justice Field, after stating the rule with reference to the risks incident to the employment said:

"It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service and to furnish sufficient and safe material, machinery and other means, by which it is to be performed, and to keep them in repair and order."

"This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery, or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered any longer open to serious question."

This doctrine has also been recently enforced, by the Supreme Court of the State of Michigan.

In *Broderick vs. Detroit, etc., Co.*, 56 Mich., 261, the employer was held liable for an injury caused by a defectively constructed damper in a ventilating shaft. The employe was attempting to close the damper when it fell and injured him.

At p. 271, the court per Champlin, J., said:

"As there was no other method provided for closing the damper, than such as was pursued in this

case, it is quite clear that the jury were justified in finding from the testimony that the ventilator was negligently constructed or maintained in the manner pointed out in the declaration."

In addition to the authorities cited by Mr. Justice Field, in *Northern Pacific vs Herbert*, we refer to the following instances where the employer has been held liable for negligence in constructing or in not repairing the instrumentalities the servant was required to use in the preformance of his duties, viz:

Want of repair in the roadbed of a railroad.

Snow vs. Housatonic R. R., 8 Allen 441.

Insufficiently supported derrick, at side of rail road.

Holden vs. Fitchburg R. R., 129 Mass., 268.

In this case the court per Gray, C. J., said:

"This evidence would warrant a jury in finding that the defendant corporation had not used the care which the circumstances required to keep the track in a safe condition, and to guard against the impending danger."

Defective construction of trestle-work.

Elmer vs. Locke, 135 Mass., 575.

Failure to repair a tell-tale or bridge-guard.

Warden vs. Old Colony R. R. 137 Mass., 204.

Improperly constructed culvert under a railroad.

Davis vs. Central Vermont R. R. 55 Vt., 85.
Chicago, etc., R. R. vs. Swett, 45 Ill., 197.

Machinery negligently set up.

Wilson vs. Willimantic Co., 50 Conn., 433.

Defective platform or scaffold:

Benzing vs. Steinway, 101 N. Y., 547.
Behm vs. Ormond, 58 Wis., 1.

Permitting car-ladder to remain out of order.

Richmond, etc. R. R. vs. Moore, 78 Va., 93

Negligently constructed railroad.

Trask vs. Cal. S. R. R. 63 Cal., 96.

Rotten ties on the roadbed of a railroad.

H. & T. C. R'y vs. McNamara, 59 Tex., 255.

Defective brake on a railroad car.

T. & P. R'y vs. McAtee, 61 Tex., 695.

Uneven and improperly constructed side-track.

Porter vs. Hannibal & St. Jo. R. R., 60 Mo., 160.

Buffers on two cars so placed that they went by each other, and crushed employe between the cars.

Ellis vs. New York etc. R. R., 95 N. Y., 546.

Defective machinery for operating a circular saw.

Indiana Car Co. vs. Parker, 100 Ind., 181.

Side track with too short a curve, and an improper connection with main track.

Patterson vs. Pittsburg, &c. R. R., 76 Pa. St., 389.

II.

The question of contributory negligence should have been submitted to the jury.

The evidence is satisfactory and convincing, that

the inside of a curve is the proper side for a brakeman to stand in making a coupling.

We have made a full summary of the evidence in the "statement of the case," and it is impossible for any candid man to read and examine it with care, without reaching the conclusion that Mr. Tuttle was not guilty of any negligence.

It affirmatively appears that he had never made a coupling on this siding before, and had no knowledge of the defective condition of the track. He commenced to work at a place where the curve was of the usual and ordinary radius, and where, even according to the witnesses for the defense, it is customary and safe for the coupler to stand on the inside, and while busy in the performance of his duty, the cars worked back on the siding to the defective point and place of danger. Did a man ever go into a death-trap in a more innocent and faultless performance of the service for which he was employed?

Was he bound to know, or to assume that the company had not performed its duty, and that the siding was not in repair, or in a safe condition?

1. The testimony is that Mr. Tuttle was an experienced brakeman, and a careful coupler, which is *prima facie* evidence that he worked on the proper side in making this coupling.

2. Three live brakemen, Messrs. Hall, Barber and Cipher, who are not in the employ of the defendant, each testified that the inside of the curve was the proper side to work on, and gave satisfactory reasons therefor.

3. The three employes of the defendant, Messrs. Keith, Brophy, and Stevens, who give a contrary

he must be held to have accepted the risk. Doubtless the plaintiff, if he knew the danger, must be held to have assumed the risk. *Kelley vs. Silver Spring Co.*, 12 R. I., 112. But we do not think that he must have known the danger merely because the chain was in plain sight; for though the chain may have been in plain sight, the defects may not have been patent to a mere casual inspection."

"Neither do we think that he was necessarily so negligent that he cannot recover if he did not carefully examine the chain. It was the duty of another servant to examine it and make sure that it was safe, and the plaintiff might not unreasonably take it for granted that the servant who was specially charged with the duty, had performed it. *Porter vs. Hannibal & St. Jo. R. R. Co.*, 60 Mo., 160. Moreover, the ratchets did not work. It is not claimed that the defectiveness of the ratchets was patent."

In the case at bar, it was apparent that there was quite a sharp curve, but that it was so very sharp or irregular, that the draw heads would pass each other, could only be known by actual experiment, or by the use of instruments. The defect was a latent one in every sense of the word.

But even if the deceased had known of the defect, it would not necessarily follow that he was guilty of contributory negligence, because, forsooth, in the busy and prompt performance of his work, he did not remember the exact locality of the point of danger

Snow vs. Housatonic Co., 8 Allen, 441.
Greenleaf vs. Illinois Central, 29 Ia., 47.

The learned district judge, who tried this case in

the court below, evidently misunderstood the facts of the case, or he would have submitted the question of contributory negligence to the jury, and have given the plaintiff's requests set forth in the assignment of errors.

We submit the judgment below ought to be reversed and a new trial ordered.

O. M. SPRINGER,
Att'y for Plaintiff in Error.

F. A. BAKER,
Of Counsel.

122.189

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1886.

LIZZIE TUTTLE,
Adm'x. etc.
vs.
THE DETROIT GRAND HAVEN
AND
MILWAUKEE RAILWAY CO.

No. 186.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Attention is directed to a few errors that appear in the Defendants brief.

I.

There is no evidence of any kind that Bootjack siding was "*laid* on a curve of 180 feet radius," as the defendant asserts.

Mr. Masson testified :

Court—What is the radius of this?

A. 180; but the rails are straight in the curves; they are about 30 feet long and the curve is made up of these chords, the length of the rail. I gave my track foreman the length of the curve; but he may not have followed it exactly. I staked it out for a 180 feet radius. * * * It might vary for the length of 25 feet, perhaps; but that it was a shorter curve for a distance of 25 feet of it I would not dispute. (R., p. 61; fol. 110.

Mr. Masson, understanding the way this track was laid, knew it was not *constructed* as he laid it out for construction; because a curve track made up of straight chords could not possibly have a uniform radius. This is self-evident. The radius would necessarily "vary" every 30 feet. As a civil engineer Mr. Masson should have known that drawheads *might* pass on the first curve from the tangent, if the radius was too short; but it appears no attention was paid by him as to how the chords or rails were put down. Had they been laid properly the drawheads could not have passed each other. Such a way of constructing curve tracks certainly shows a want of care or skill on his part.

It would seem also, as it is necessary for the operation of the defendants business, that yard tracks should be laid and especially tracks used for storing cars on, so the draw heads would not pass each other, that Tuttle would be justified in assuming bootjack siding was so constructed, in as much as it would be difficult indeed to remove cars from such a track if the drawheads would not meet. Drawheads are intended to receive the concussion of the cars when they come together, and it is quite essential that they should meet at all times for the protection of the cars.

II.

Tuttle *was* killed within the "space" where the drawheads of the cars would "inevitably" pass each other. Mr. Lovett was not at all positive about the distance from the end of the track to where Tuttle lay when he arrived on the scene. He testified:

Q. Where was Tuttle when you got back there?

A. Between the rails, I think about six feet from the end of the car.

Q. *Nearest* you?

A. No; the cars were about *six feet apart* and he was lying nearest to the car *fatherest back*.

Q. How many feet from the car that was on the slip?

A. I say about 6 feet from the car that way.

Q. Can you tell us about how many feet it is from the end of the track, from the rail, to the place where you saw Tuttle?

A. Yes, sir, I could tell pretty near.

Q. Well, just get at it as near as you can?

A. About 70 feet.

Q. To where you saw him?

A. Yes, sir.

Q. That is from the end of the rail or bumper?

A. From the end of the rail. I suppose there is not much difference between the end of the rail and the bumper. I did not make an *exact* measurement.

Q. Did you measure that track last night?

A. *I did not measure the track.* I could not get a *correct* measurement because there were cars there.

Q. How far is it from the end of the rail to the spile?

A. Not over 18 inches at the most.

Q. You measured from where you saw Tuttle to the spile, did you not?

A. No, sir, I don't think so.

Q. Well how did you measure?

A. Mr. Tuttle was lying about 6 feet from where we measured. We measured to where the corner of the car stood (from the spile.)

Q. That is the corner of the *two cars* that were on the side track?

A. Yes, sir; that were on the slip?

Q. How many feet was that or yards?

A. About 21 yards I think. (R., pp. 46, 47, 48; fols. 83, 84, 85.)

Mr. Stevens testified:

Q. How far was it, about, from the edge of the dock *the Water line of the dock* that the accident occurred?

A. I should think about two cars.

Q. That would be about 60 feet?

A. It would be about 60 feet. (Record, p. 30; fol. 50.)

Mr. Campau testified:

Q. At the beginning of this 12 foot space within which the drawheads would pass, that 12 foot space would commence about how far from the dock?

A. *53 feet and a half (referring to memorandum.)*

Q. That is 53 feet from the end of dock?

A. No; 5 feet less than that.

Q. 47 feet then is what you mean?

A. About 48½ feet.

Q. From the dock *end* of the track that this 12 foot space begins?

A. Yes, sir. (R., pp. 36, 37; fols. 62, 63.)

It is evident from this that Mr. Campau measured from the spile, which was 53½ feet from the 12 foot space, or 5 feet from the end of the track.

Mr. Braithwaite, testified:

Q. How far is it from the end of the track here to the spile that is used as a bumping post?

A. From the edge of the dock?

Q. Yes, sir?

A. To the spile that is used as a bumping post?

Q. Yes, from the rail to the spile?

A. From the rail to the spile—to the edge of the dock—it is 4 feet.

Q. I know, but how far is it between the spile that is at the end of the dock and the end of the rail?

A. It would be about three feet.

Mr. Campau testified from *memorandum* and Mr. Braithwaite from memory; but let the shortest distance given, 3 *feet*, be deducted from the 21 yards—the distance from the spile to to end of the car to where Tuttle lay, and we have 60 feet as the correct distance from the end of the track to where Tuttle was killed.

From the *end* of the track to the beginning of the 12 foot space, it was 48½ feet to which add the 12 foot "space" equals 60½ feet which shows absolulely that Tuttle *was* killed *within* this "12 foot space." It will be noticed also that Mr. Campau testified that this "space" was larger if the *"lateral play"* of the

drawheads were taken into consideration something that always exists. (R. 172, 36 and 37, fols, 61, 62, 63.

Another fact that argues that the drawheads passed each other on and by reason of this 12 foot space—the improperly constructed part of the tracks—is the fact that the draw bars of the cars were not out of repair.

Keith said there was nothing unusual about the cars and Lovette testified that draw heads looked to be "*in perfect repair.*" (R., pp. 20, 49,; fols. 32, 86.

Another fact that shows that the draw backs were not out of repair and that it was the construction of the tracks that caused them to pass where Tuttle attempted the coupling the *third* time, is that he had made two efforts on the same track, near the place where he was killed, to make the coupling and the draw heads *did not pass* each other. (R., pp. 23, 24; fols. 37, 38, 39.)

III.

There is no evidence showing that "drawheads of cars quite often pass each other when they come together on tracks of usual curve and occasionally on a straight tracks."

On this point Keith testified:

Q. Is it an unusual circumstance for draw heads to slip by each other in coupling?

A. It is not.

Q. You say you have seen draw bars pass each other on a straight track?

A. Yes, sir.

Q. That would be where they were out of repair?

A. They didn't seem to be out of repair.

Q. Did you ever see draw bars that were in good repair that would pass each other on the same level on a straight track?

A. Yes, sir; I have seen draw bars that looked to be in repair.

Q. They would not be in repair would they, if they would pass?

A. Well, there *was* some round headed draw bars the faces round. You take two of them and they will lap?

Q. Were these draw heads round?

A. One of them was not the D. & M. Car. I dont remember exactly what was on the other.

Q. But where there were two round draw bars they might go by?

A. They would pass easier.

Q. But one or the other of them would have to be thrown out of position.

A. They would have to be *twisted* a little.

Record, pp. 21, 24, 27, 28, 29; fols. 33, 39, 44, 47.

We all know that draw heads in good repair cannot pass each other on a straight track on the same level; "they would have to be twisted a little" enough to throw them out of line.

IV.

The reason given by Barber, Hall and Cipher for going on the inside of a curve to *make couplings, did exist here.*

Keith was not on hand and did not transmit signals the first or second time the coupling was attempted. When asked why he went down where Tuttle was he replied:—"*Because the coupling had been missed twice.*" (R., pp. 19, 21; fols. 29, 33.)

This answer does away with the defendants whole defense viz.: that it was not necessary for Tuttle to be where he was. It shows that there was not a "*full gang employed at making the coupling*," and it was admitted by counsel for the defendant, "if there was not a full gang employed at making the coupling, it was necessary for Tuttle to be where he was and that *he was not guilty of contributory negligence.*" (R., p. 70; fol. 128.)

Keith also said that he and his helper were transmitting signals; but that they would not have been doing so if the engineer could have seen Tuttle. That is if Tuttle could have seen the engineer he would have been expected to give his own signals and to do this he would have to be on the inside of the curve. The jury would have been justified in finding that the engineer *could* and *did* see, Tuttle; and that he was giving all his own signals, without aid from any one as it was evidently expected he would do.

Stevens claimed that there was a building between him and Tuttle; and also a pile of staves. The staves were between the building and Tuttle and the building was between the staves and the engine. Both, therefore, would not obscure the vision. If he could see beyond the building to the staves, the building did not obstruct his view, and according to Lovett the pile of staves was *about* four feet high. (R., p. 48; fol. 85.)

The staves could not prevent Stevens from seeing Tuttle, had they been 6 feet high, for Steven's elevation at the engine would be at least 8 feet, and this would enable him to see over the staves.

The building was not in the way.

From the building to the spile at the end of the track, it is 250 feet. Taking a position 60 feet from the end of the track, or about where Tuttle was killed, the engine could be seen 40 or 50 feet beyond the building. (R. p. 57; fol. 104.)

Then 250—60x40 = 230 ft. the distance that could be seen from where Tuttle was killed before the building interfered with the view. They only claimed at most to have 6 cars between Tuttle and the engine, the longest of which would not be over 32 feet in the *train*. (R., pp. 22, 23, 30; fol. 36, 49.)

∴ 230 feet—32x6 = 42 feet, at least, that could be seen beyond Stevens from where Tuttle was killed.

There is no doubt but what Tuttle gave all his own signals. See Record, p. 13; fol. 19.

V.

There is no evidence of "a similar curve" ie, a hodograph curve with a radius of 98 feet 10 inches, in the defendant's yard.

Mr. Masson testified:

Q. What is the smallest radius you have in this yard?

A. To day.

Q. Yes, sir.

A. There are curves of 200 feet radius. This was put in for 180 feet, and there are curves of 200 feet.

Q. This is the shortest one in the yard, isn't it?

A. I think very likely.

Had this curve been constructed as laid out, on a radius of 180 feet, draw-heads of cars "*in perfect repair*" could not pass on any portion of the track. This assertion is capable of mathematical demonstration as will be illustrated hereafter. The question, is therefore, was the difference between the way the

track was *constructed* and *laid out for construction* enough to make the construction *apparently* dangerous?

Mr. Masson testified that the difference between a radius of 180 and one of 90 feet "although *apparently large*—really" didn't "amount to much in practice," it would not make a difference of more than half a rail, and for all practical purposes it would make no difference in the working of the track—a little *variation in a short chord*."

A radius of 180 feet = ½ the diameter of a circle = 360 feet; and a radius of 98 feet = ½ the diameter of a circle = 196 feet. 360x22-7 = 1131-7, which is the length of the circumferance of a circle with a radius of 180 feet and 196x22-7 = 616 which is the circumference of a circle with a radius of 98 feet. Put the small circle inside of the large and compare the arc of the *curve* in say 25 feet of the circumference of each and it will be seen the indifference "really don't amount to much;" that it is hardly preceptible.

Figure 1.

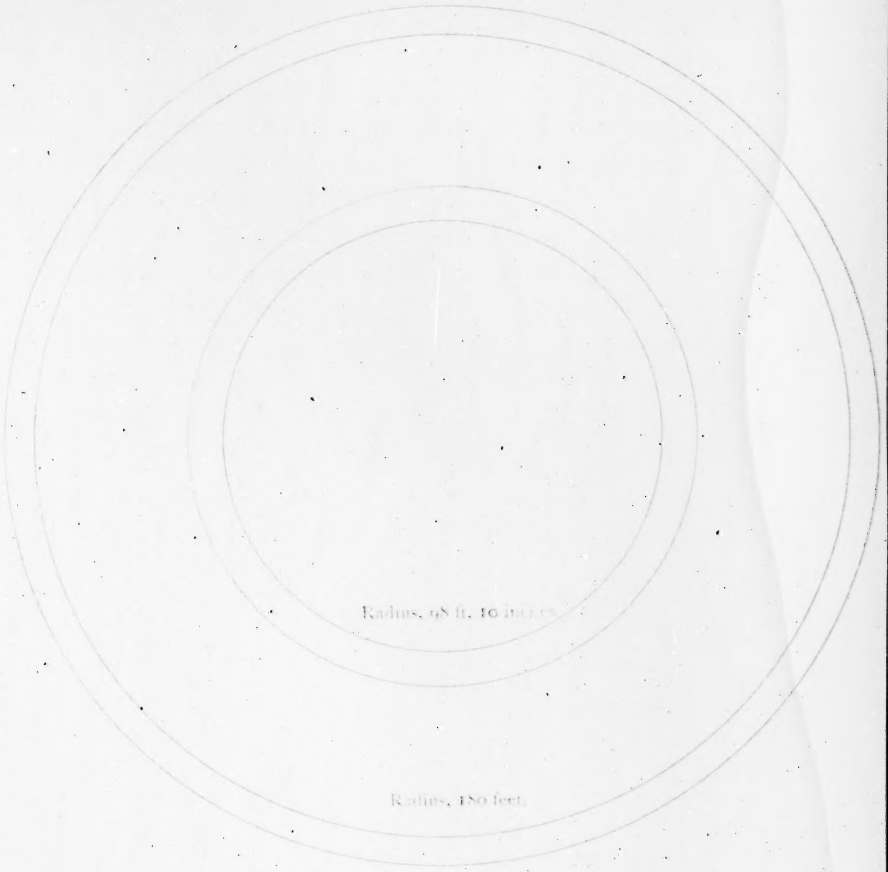

Figure 2.

"A little variation in a short chord" would make the difference. Exhibits "B" and "C" are correct diagrams of the track, "C" as it was *actually laid out*, and "B" as it was actually *constructed*. The difference between the curves in the two diagrams is not noticeable as may be seen by Figure 2, and hence we say that the curve in Bootjack siding was not *apparently* dangerous to Tuttle because the larger the scale showing the circumferance, the less apparent would be the curve thereof. That is if a curve with a radius of 180 feet were produced showing a circle with a circumferance of 1131 feet, also one with a radius of 98 feet showing a circle with a circumference of 616 feet—the difference in the ares of the curves in 25 feet of the circumferance of each could not be distinguished by observation. The difference of course between 25 feet of a curve with a radius of 98 feet, and 25 feet of a curve, with a radius of 123 feet, would be much less, and all the more imprecceptible. See the second 25 feet of Bootjack siding from the straight line, the radius of the curve was 123 feet. (R. p. 33 fol.5)

It is almost certain that Tuttle made one of his unsuccessful efforts to make the coupling there and the draw-heads did not pass, and he was safe. He knew then that it was *safe* to attempt the coupling at one place, was he bound to *know* that it was not at the other and notice that he had reached a dangerous place? Were it even possible to notice by looking over the track that the curve was sharper near the straight part of it than where the radius was 123 feet that was impossible, for the track was full of cars.

VI.

There was no variance between the declaration and the evidence. The testimony of Masson, the defendants chief engineer

shows that he and the "track foreman," (whose duty it was to "*keep up*" the track) were conversant with the condition of Bootjack siding, for he says regarding it, "It has been in constant use, and worked and shifted about" (to suit their purpose) "The object of the track was to get to the slip with lumber." (R., p. 64; fol. 115).

Occasionally where cars run off the track it is torn up, and the rails "disturbed." No other accident, except a collision, known to railroading would have any tendency to change the radius of a curve. Suppose, however, that the rails of Bootjack siding since its original construction were "disturbed" in some such a way, would not that necessitate the re-construction of the track, and would not that require just as much care and skill as the original construction? If the track was "*shifted about*," that implies taking up and re-laying the rails. In either case, if the work of putting down the track was unskillfully or improperly, or negligently done, would not the defect be in the construction? But there is no evidence that the rails of Bootjack siding were ever "disturbed" by a car getting off the track where this accident occurred. Mr. Masson is not sure about the way in which the defectiveness came into existence, for he said "I gave my track foreman the length of the curve, but he *may not have followed it exactly*." It does not appear when he gave the track foreman instructions. (R., P. 61; fol. 109.

Mr. Braithwaite, the civil engineer who assisted Mr. Campau in making the survey of the siding, testified that Exhibit "B" is a correct diagram of the track. (R., p. 56 57, fol. 103.

Exhibit "C," produced by the defendant, shows that the radius of the curve in question should have been 180 feet, for it

is marked thereon in red ink as 180½ feet. (R., p. 64, fol. 116, p. 80, fol. 153).

Mr. Campau testified that the track was actually constructed with a radius of only 98 feet 10 inches, running into the straight part of the track, which would make a space of at least 12 feet where the draw heads of cars would inevitably pass each other. Record, p p. 33, 37; fols. 55, 61, 63.

The difference between the way the track was constructed and laid out, according to Mr. Masson, was of no consequence so far as the operation of the track was concerned.

Q. Would they (draw heads) not pass each other where there was a straight track, with a curve leaving it the first 25 feet, with a radius of 98.80?

A. I don't think so. I say from my *experience* they would not *from what I have seen*. I know nothing about this particular case at all. Record, p. 62; fol. 112.

Redirect, by Mr. Meddaugh.

Q. You said practically in the operation of the track it didn't make any difference?

A. No, sir, not as far as the tracking of the wheels was concerned. (R., p. 65; fol. 118.)

This evidence shows that the track was not "out of repair" but that the defect was in the track as it was constructed, which was termed negligent and unskillful construction. The declaration counts upon the duty of the defendant to furnish the deceased with a safe place to do his work without exposure to unnecessary danger and alleged the breach of such a duty to exist in the construction of boot jack siding. It would be a hard matter to "state the nature" of the duty more clearly.

Pleadings are for the purpose of informing the parties and the Court of the subject in controversy. (Batteson vs. Chicago G. T. R'y Co., 49 Mich. 185.)

This we think we have done, especially if "declarations for negligent injury are construed with reasonable intendment."

But a variance between the declaration and the proof should be taken advantage of at the trial.

Suppose, however, that the track was out of repair, that was negligence on the part of the "track foreman," whose duty, according to Masson, it was to "keep up" the track. The defendant would have set up the same defense had we alleged want of repair, and the same evidence that has been introduced would make it liable. (Haugh vs. R. R. Co., 100 U. S. p. 224.

VII

But counsel questions the soundness of the rule in the Hough case. He argues that as the engineer was competent he would be "the best possible judge of the safety of the engine," and so that Tuttle should have been the best judge of the safety of the Bootjack siding.

We suggest that there could not be a better illustration of the fallacy of such argument, nor a clearer demonstration of the wisdom of the rule in the Haugh case, than is presented by the case at bar. Undoubtedly Tuttle knew he was working on a curve track, but did he know or should he have known that the draw-bars would pass each other there? The "*space*" where the draw heads passed could only be located by instruments used by *civil* engineers.

Under the ruling in Swoboda vs. Ward, 40 Mich. 420, he had a right to suppose the place safe. Tuttle must have noticed

that the "wheels would follow" the track. What if his *experience* taught him that draw-heads *ought not to pass, at all any curve the wheels would follow*? (See R., p. 62, fol. 112).

If Mr. Masson, with all his experience and learning and knowledge, as a practical civil engineer, did not know that such a thing (as draw-heads passing each other on any curve the wheels would follow) *might* occur, is it *reasonable* to say that Tuttle should have possessed such knowledge? Of course not.

Keith said if the draw-bars had not passed Tuttle would not have been killed, they had met twice before on the same curve, not many feet from where they passed, and Tuttle was not injured. Was not that enough to warrant him in making a third attempt, and in supposing that the curve was properly constructed and safe?

VIII.

The defendant argues it was not negligence to require its employees to use the track in question, claiming that "there is no possible rule of safety in the radius of a track's curve."

We contend, however, that there is a *mathematical* rule that should govern the construction of all *hodograph* curves or curves running into a straight track. We conceed that no rule is *necessary* in the construction of any other curve because draw bars will certainly meet on any curve the "wheels will follow," except a hodograph curve. This is true as a mathematical proposition, as may be seen by the following figure.

Let figure 3 represent a curve track with a radius of 180 feet produced and showing a railroad track on a circle with a diameter of 360 feet.

It needs no argument to prove that the draw heads will meet on such a curve or on any curve that the "wheels will follow" provided the curve is extended; because the drawbars are in the same line, that is, they are in the same position on each car, to wit; in the centre, and are in the same plain

Figure 4 shows a hodograph curve or a curve running into a straight line. As is shown by Exhibit "A" when one car runs on the straight line or track, the draw heads are thrown out of line, because the curve leaving the tangent is too sharp. This fact was not only ascertained by the experiment that cost Tuttle his life, but by measurement and the use of a theodolite. The place was located by Mr. Campau and Keith and Lovett as near the end of the boat slip in the first 25 feet of the curve from the tangent.

We all know that a car on a straight track and one on a curve could not be in a *line* with each other; and it seems to us that argument is hardly necessary to show that there are but two ways of finding out whether draw bars will pass on any portion of a curve running into a straight track or not, viz: by experiment and by the use of instruments and measurement and *actual* mathematical calculation.

There is no evidence in this case to show that Tuttle had any knowledge of the fact that draw-heads would pass on Bootjack siding, and it cannot in view of the foregoing be said that the danger was *apparent*, for the reason that it could only be ascertained as we have pointed out.

IX.

Tuttle had only been in the employ of the defendant 6 or 8 days when he was killed. (R., p. 22; fol. 34.

Five days were put in at night. (R., p. 67; fol. 120.)

The coupling he was trying to make, "was the first one that he had attempted" there. (R., p. 21, fol. 33.

Suppose the danger in Bootjack siding, the 12 foot space, was apparent to observation, it is not likely the man knew or

had any opportunity to know, that the siding was dangerous before he was called upon to make a coupling there. He could not make an observation there because the track was full of cars, as we have pointed out. In view of the foregoing we submit,

I.

That the evidence shows Tuttle was killed by reason of the defective construction of Bootjack siding as alleged in the declaration.

II.

That the danger occasioned by the negligent construction of Bootjack siding was not *apparent* to observation.

III.

That there is no evidence showing that Tuttle had any opportunity to make observation to see that the track was improperly constructed.

IV.

He was not bound in order to escape the charge of contributory negligence to look around to see if the defendant had been guilty of negligence.

V.

There is no evidence of any careless act or commission on Tuttle's part.

Therefore the case should be reversed with costs and a new trial ordered.

O. M. SPRINGER,
Attorney for Plaintiff in Error.

F. A. BAKER,
Of Counsel.

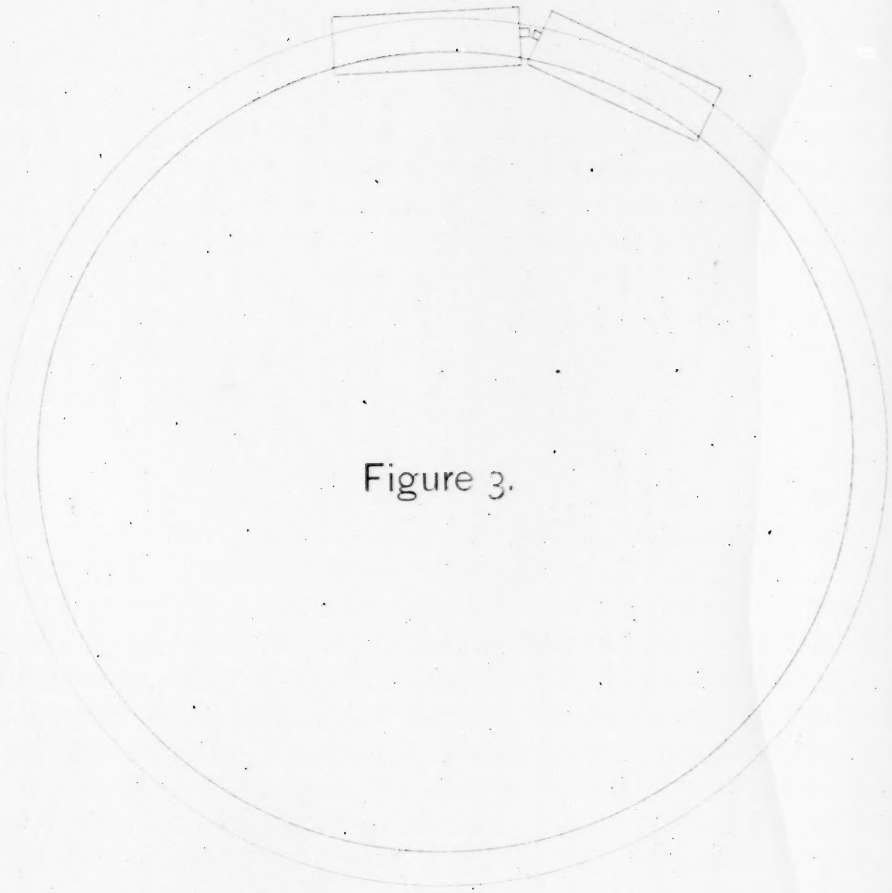

Figure 3.

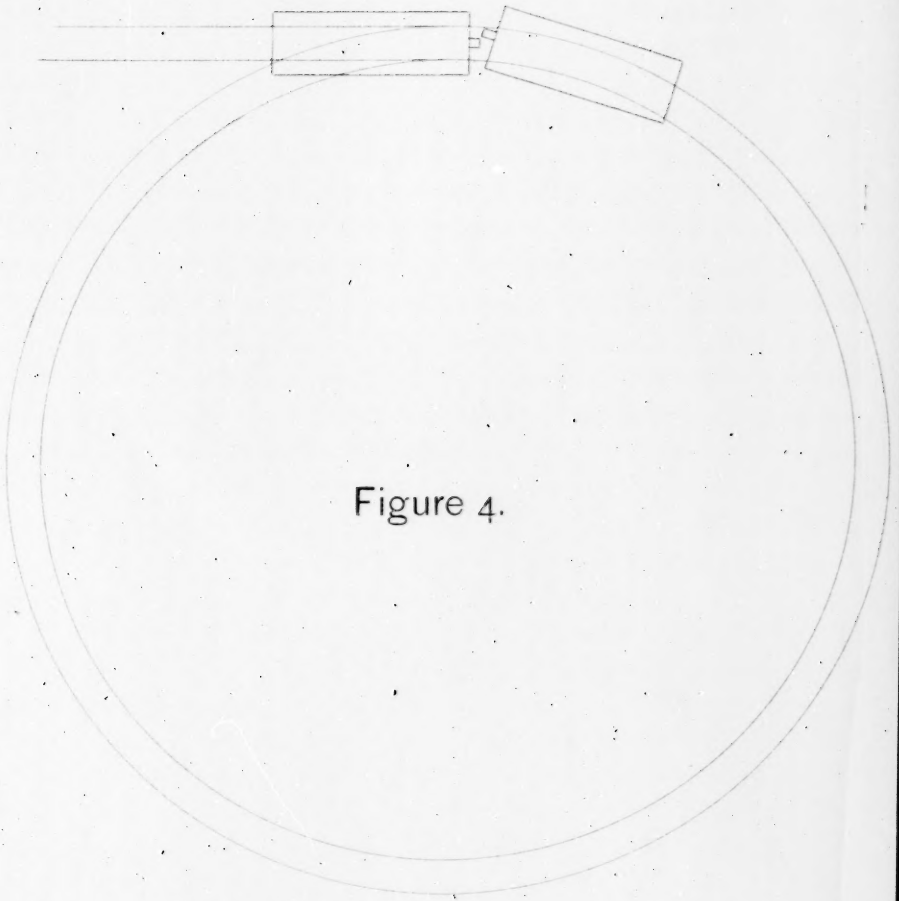

Figure 4.

122.187

Supreme Court of the United States.

October Term, 1886.

LIZZIE TUTTLE, Administratrix, &c., *Plaintiff in Error*, *vs.* THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, *Defendant in Error.*	No. 186.

Brief For Defendant.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Supreme Court of the United States.

October Term, 1886.

LIZZIE TUTTLE, Administratrix, &c.,
Plaintiff in Error,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY,
Defendant in Error.
No. 186.

BRIEF FOR DEFENDANT.

Plaintiff's intestate was caught between two cars and killed, while in the act of coupling them.

The facts are—and I invite careful attention to this statement of them—as follows:

In defendant's station yard at Detroit there is a siding or spur track leading from a main track to a dock slip. It is shown on Exhibits "B," and "C," of the record. This track was laid on a curve of 180 feet radius.—Rec., p. 61.

The testimony on the part of the plaintiff tends to show that there is a space in the track twenty-five feet

in length, which has a curve of 98 feet, 10 inches radius, and that other parts of the track are on a curve 123 feet radius.—Rec., p. 33.

Such sharp curves in tracks are not common, but occasionally are found in station yards.—Rec., pp. 40, 60, 63.

This track was laid to reach the slip dock with cars of lumber for vessels.—Rec., p. 59.

It was sometimes used for storing cars.—Rec., pp. 62-3.

There was testimony on behalf of the plaintiff tending to show that in a space of twelve feet of this track the draw-heads of certain cars which the witness measured would inevitably pass each other, if the cars were brought together there.—Rec., pp. 36-7.

On the other hand, the chief engineer of defendant's road thought they would not pass "on any curve the wheels would follow."—Rec., p. 62.

Deceased was one of three men who, together with the engineer and fireman, constituted a switching crew in the yard.—Rec., pp. 17 and 18.

One of the three men was termed yard master, and the two others were his helpers. The yard master, however, was simply a fellow worker with the others, charged with the additional duty of directing the movements of the engine.—Rec., p. 28.

The engine with five or six cars backed upon the siding in question, to connect with and take out one of the cars that were standing there.—Rec., p. 16.

Deceased was on the inside of the curve, and he undertook to "couple on" the standing car as the engine backed the moving cars down to it. He tried twice and failed, and the third time the draw heads passed each other, and he was caught between the two cars and killed.—Rec., pp. 18 19-23.

Had he been on the outside of the curve, he could have done his work equally well, and would have been perfectly safe from such danger.—Rec., pp. 20, 21.

Whatever may be the practice of yard men to make these couplings from the inside of curved tracks, and whatever convenience there may be of doing so, under some circumstances, as testified to by plaintiff's witnesses, there was certainly no excuse for it here. There were two men with deceased to take and transmit his directions to the engineer for moving the train.—Rec., p. 19. And they were there for this very purpose.—Rec., p. 70.

Both of deceased's fellow workers were on the opposite side of the cars and curve from him.—Rec., p. 25.

The work was being done in broad day light, and the sharpness of the curve must have been apparent to deceased, particularly when he had made two ineffectual attempts to make the coupling.

He had been engaged in coupling cars in this yard seven or eight days, (Record, p. 22,) and was an experienced yard man.—Rec., pp. 18, 52 and 55.

With his large experience, he must have known, what is self-evident to all, that doing this work on the inside of such a curve was very hazardous, and that the outside of the curve was comparatively free from danger. There is not a scintilla of testimony to afford an excuse for his being on the inside. Keith, his fellow worker; Stevens, the engineer of the train; and Lovett, the fireman,—all agree that the engine's movements were directed through Keith and McDermott, the other yardman.

The testimony on behalf of the plaintiff, that the inside of a curve is the proper place from which to

make a coupling, taken with the reasons the witnesses all give for it, is of no importance, in view of the undisputed facts in this case. Plaintiff's witnesses on this point were all common train brakeman, and referred only to the usual train service. They were, in other words, not yardmen. The reasons they gave for doing the work from that side did not exist here.

An attempt was made to get before the court some testimony tending to show that deceased was killed within the space in the track—the 10 or 12 feet—in which the witness Campau stated the draw heads of the cars would inevitably pass each other, but it was unsuccessful.

Campau located this space on the track at 48 1 2 feet from the dock.—Rec., p. 37.

Lovett gave the place of the accident as 70 feet from the dock.—Rec., p. 47.

These figures of distances were not guesses, *but the result of actual measurements.*

If it be assumed that there were three cars standing on the siding, as the testimony all tends to show, (Rec., pp. 16 and 23,)—the place of the accident must have been at least between ninety and one hundred feet from the end of the dock or rails.

Even if there were but two cars there, each 33 feet in length, and they were pushed to the end of the track, this would determine the place of the accident to have been outside of the witness Campau's fatal space of ten or twelve feet.

The undisputed testimony tended to show, that exceptional tracks of the curve of this one are not uncommon in station yards.—Rec., pp. 60, 61, 63.

It also appeared that draw heads of cars quite often pass each other when the cars come together on

tracks of the usual curve, and occasionally on a straight track.—Rec., pp. 21, 24, 27, 28.

In addition to the fact which was apparent to deceased as he tried to make the coupling on this track, that the curve was very sharp, he must be presumed from his experience, to have known that such sharply curved tracks exist in station yards, and that drawheads of cars coming together on them are liable to pass each other, thus exposing a person in the act of coupling them in his position to great danger. Therefore he was bound to be on the alert for his own protection.

It further appeared that Keith, who was in charge of this crew, had known draw-bars to pass each other on this track before, and that he did not inform deceased of the fact or apprise him of danger, although he was an eye-witness of deceased's attempt to make the coupling.

This track, with others of a similar curve in defendant's yard, had been in use for a number of years, thus affording a practical refutation of the idea that it could not be safely, if carefully, used.—Rec., pp. 19 and 59.

There was no attempt made to prove the allegation of the declaration that the car was *improperly* provided with a single deadwood instead of a double one. On the contrary, it affirmatively appears that there was no fault in the cars.—Rec., p. 20.

On this state of facts the district judge, presiding at the trial, took the case from the jury, and directed a verdict for the defendant.

I.

The first point to which I wish to call the court's attention as matter of law is, that to sustain proof of neglect to maintain the track in the condition of its original construction; it is necessary that the declaration should allege a breach of this duty. The declaration makes a case of improper *construction* only, in respect of the track.—Rec., pp. 3, 4 and 5.

And so, in respect of any neglect of defendant to inform deceased of the danger attending the work of coupling on this track. The declaration does not charge defendant with a neglect of either of these duties.

Nothing in the law is better settled than that the specific duty relied upon, and the manner of its breach, must be set forth in the declaration, and that a recovery can not be had on proof of the breach of any duty not alleged.

> Marquette &c. R. R. vs. Marcott, 41 Mich., 433.
> Price vs. St. Louis &c. R. R. Co., 3 Am. & Eng. R. R. Ca., 365.

"When the plaintiff's right consists in an *obligation on* the *defendant* to *observe some particular duty*, the declaration must state the nature of *such duty*, * * * * * * * * and the plaintiff must prove such duty as laid, and a variance will, as in actions on contracts, be fatal."

> 1 Chitty on Pleading, 383.

II.

It was not negligence in the defendant company in respect of its employes having to use the railroad track in question, to lay the track on any curve practicable for the operation of cars upon it. There is no possible rule of safety in the radius of a track's curve. It is always only a question of degrees of danger. Nor is there any common rule of practice. To refer the matter to a jury in every case,—that most incompetent of bodies for such a question,—would be in effect to make railway companies insurers of the safety of such tracks; for there would be no escape from liability. All curves would become inexcusably dangerous.

In the case of *Randall vs. Baltimore & Ohio R. R. Co.*, 109 U. S., 478, this court held there was no evidence of negligence to go to the jury, in the character of the switch constructed and in use in the company's yard, although a witness had given his opinion "that it was not a proper kind of a switch."

On pages 482-3, it is said, "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, *and any one who enters the service of a railroad company connected with the moving of trains*, assumes the risk of that condition of things."

The exceptional requirements of a station yard are here recognized, as is also the wholesome rule which leaves responsibility for the hazard incident to a service alone on the person entering it. And the right of a railway company to use appliances that the exigencies of the situation require, is also implied.

Judge Cooley, putting the master's duty to his servant on the same footing as his duty to others who may be invited upon his premises, says, "The party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, *and not open to observation.*"

Cooley on Torts, 550.

Again, having stated that the master is exempt from responsibility in all cases *where the danger is apparent*, and that the legal undertaking of the master to his servant is not that his buildings, appliances, &c., are as safe as those of his neighbors, this eminent author adds, "There are degrees of safety in buildings, which differ in age, construction and state of repair, as there are also in the *different methods of conducting business*; and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings and machinery, *such as they are*, shall not cause injury, and that the business, as conducted, shall not inflict damage, &c."

The Supreme Court of the State of Michigan, in a recent case, (*Richards vs. Rough*, 53 Mich., 213,) discussing the question of the liability of the master for injury to an employe, caused by machinery, uses the following language: "The comparative merits of the different kinds, whether as to safety or utility, are questions most difficult to solve, *and to say that it shall be left to a court or jury to determine in any*

given case which kind a manufacturer shall use in order to avoid liability in case of an accident to an employe while using it, would be imposing a duty upon the court and an injustice upon the party alike intolerable. A manufacturer must be permitted to choose the machinery he desires to use, and to control his business in his own way, provided he does no unlawful act. He may use new or old machinery, according to his liking, and if it is sound, well made and kept in repair, he will not be liable for an accident occurring to an employe using it, &c."

The Supreme Court of Connecticut, in *Hayden vs. Smithville Manufacturing Company*, 29 Conn., p. 558, speaking with reference to the claim made in the case that defendants ought to have covered the machinery by which the plaintiff was injured, so that he would not have come in contact with it, say: "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land."

This, I submit, is equally the right of every railway company. It may lay its tracks upon any curve that is practicable for the business to be done on them.

And there is nothing unreasonable in the rule. The man, in almost every instance, knows more about the business than the master—the part of it involved in his injury. He better knows what are the hazards of the work in hand. Take for instance this very matter. To assume that any of the officers of the defendant company better knew or appreciated the danger of coupling cars on a curved track like the one here, would be to ignore our common knowledge. We know better. Deceased was proven to have had large

experience in this work. There is good reason for holding the master strictly to the duty of disclosing to his employe all hidden defects, and, further, to hold him responsible for injuries caused by known or apparent ones, under exceptional circumstances. But the weight of reason, I insist, is against charging the master with liabilitiy for defects in premises or machinery which are as well known to the servants as to the master, or where they are apparent and there is no excuse for the servant's failure to observe them and protect himself, save his want of attention.

In *Day vs. Toledo, &c., R. R. Co.*, 42 Mich., 523, a brakeman was injured while in the act of coupling cars loaded with lumber. The lumber projected over the end of one of the cars, so that it interfered with his making the coupling in the usual way. This was the only negligence alleged. The court below took the case from the jury, and directed a verdict for defendant. The Supreme Court say, (page 525,) "The injury was from one of the risks incident to the occupation of plaintiff, and he knew better than the conductor or any one else the precise difficulty to be guarded against. * * * * *He appears to have been an experienced brakeman, fully able to take care of himself.*"

There was in this case an exceptional danger in the work of coupling. The man was experienced in the business. The danger was apparent and not hidden. In all essential particulars it was like the case at bar. The same principle is applicable.

In the case of *Lovejoy vs. Boston, &c. R. R.*, 125 Mass., 79, where an engineer while looking out of the window of his running engine, was struck by a signal-post and killed, it was held there could be no recovery, he being aware of the danger.

Baylor vs. Del., &c., R. R. Co., 40 N. J. Law, 23, was the case of a brakeman injured by coming in contact with an overhead bridge, while in the performance of his duty upon the top of a railroad train. On page 24 the court say: "There was no evidence to show, nor was there pretence, that it was customary for railroad companies to build the bridges spanning the public roads with an elevation sufficient to admit of a man to pass under who is standing upright on the top of a car. Such is not the practice of this company, nor of any other, so far as appears. Such structures would often be inconvenient, and sometimes, perhaps, *impracticable*. It is therefore quite plain that the defendant did not owe any duty to this plaintiff not to subject him to the danger into which he fell. This being so, it is also plain that the plaintiff is chargeable, from the mere fact of his entering upon this employment, with a knowledge that this danger existed. * * * * * It was said that the defendant was bound to apprise the plaintiff when he entered into this employment, that the bridges along the line of this road were dangerous under certain conditions. It seems to me that it might as well be insisted on, that the plaintiff ought to have been notified that the usual rate of speed with which the cars ran on the road was a hazard."

In the case at bar, it not only does not appear that tracks of similar curve to the one here involved are not found in the station yards of other companies, but, on the contrary, it appears that they are,—as I have already pointed out. And it is also in proof that a less curve is sometimes in these yards impracticable, as in fact it was in this track.

Wells vs. R. R. Co., 56 Ia., 520.—A brakeman, while riding on top of a car, came in collision with a bridge

and was killed. He was shown to have been for some time in the service of the company. Held, (page 524.) that the court below should have instructed the jury that if deceased had knowledge of the height of the bridge, in continuing in the service thereafter he assumed the dangers incident to the service, and there could be no recovery.

The danger in our case was apparent.

In Sweeney vs. Central Pacific R. R. Co., 57 Cal., 15, plaintiff's intestate, who was in the service of defendant upon a gravel train, was killed by the train being thrown from the track in running over an animal.

The negligence alleged was the failure to fence. It appeared deceased knew of the fact that the road was not fenced. On page 17, is given the instruction of the trial judge to the jury, as follows: "If he (the servant) sustain an injury by reason of some defect or imperfection which was known to, or should have been known to, his employer, and of which he neither had nor could readily obtain any knowledge, he could have his remedy against the employer; for then he had the right to rely upon the presumption that such employer had performed his whole duty in that behalf, and the risk he incurred was not one that he could reasonably anticipate, nor was it naturally incident to the employment. But, on the other hand, if the employer disclosed to his employe the defect of the machine which made it dangerous, or it was well known to him, and he still voluntarily engaged in the employment, he assumed the consequences of the danger he incurred, and by his own carelessness and recklessness contributed directly to the injury sustained by him; the risk was reasonably and naturally incident to his employment."

The court approved this as a correct statement of the law.

Naylor vs. C. & N. W. Ry. Co., 53 Wis., 661. Plaintiff was engaged as a laborer in a gravel pit, and a bank of earth under which he was excavating, fell upon and injured him. It appeared that the superintendent had warned the men to be careful, saying to them that it did not look safe. On the trial, the court below ordered a nonsuit. On page 664, the court say: "It is well settled, * * *, that the master may conduct his business in his own way, although another method might be less hazardous; and the servant takes the risk of the more hazardous method as well, if he knows the danger attending the business in the manner in which it is conducted. Hence, if a servant, knowing the hazards of his employment as the business is conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury merely because he may be able to show that there was a safer mode in which the business might have been conducted and that had it been conducted in that mode, he would not have been injured."

In Sullivan vs. India Manufacturing Co., 113 Mass., 396, it is said, "When the servant assents to occupy a place prepared for him, and incur the dangers to which he will be exposed thereby, *having sufficient intelligence and knowledge to enable him to comprehend them*, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."

In Rains vs. St. Louis &c. R. R. Co., 71 Mo., 164; an employe was injured by an overhead bridge. The jury was instructed that although "Rains may have failed to exercise ordinary care and prudence at the time he was killed, and may have been guilty of negligence or carelessness which contributed to the injury complained of, yet, if the defendant might, by differently erecting and maintaining the bridge spoken of by the witnesses, or by the exercise of ordinary care and caution, have avoided the injury, the jury will find for the plaintiff."

The court held this instruction erroneous, and on page 167, say, "The cases cited by the plaintiff, in which instructions similarly worded received the qualified approval of this court, were wholly unlike the present. They were not cases in which the acts of the defendant occasioning the injury consisted in the erection of insufficient or dangerous structures, *obvious to the senses long before the accident*, and therefore long before the concurring negligence of the plaintiff, but they were cases in which negligent acts of the defendant, contributing to produce the injury, occurred after the contributory negligence of the plaintiff, and without which the plaintiff would not have been injured, notwithstanding his own want of reasonable and ordinary care."

Baltimore, &c. R. R. Co. vs. Stricker, 51 Md., 47. The plaintiff, a conductor of a railway train, was injured by striking an overhead bridge, while in the discharge of his duties. On page 70, the court say, "In constructing the bridge all that was incumbent on the company was to build it of sufficient height to enable the employes, in the discharge of their duties, to pass under it in safety, *by the use of ordinary care and prudence*: and there is no evidence in

the case that this duty was not performed." It was held there was no case for the jury.

See also Clark, Admr. vs. Richmond &c. R. R. Co, 78 Va., 709.

In the case of Holden vs. Fitchburg R. R. Co., (129 Mass., 268,) his Honor, Justice Gray, delivering the opinion of the court, expressed the rule as follows; "It has been settled that the master, whether a natural person or a corporation, is *bound to use reasonable care* in selecting his servants, and in keeping the engines with which, and the buildings, places and structures in, upon or over which his business is carried on, in a fit and safe condition, and is liable to any of his servants for injuries suffered by them by reason of his negligence in this respect. * * * * * The master *does not warrant the safety or sufficiency* of such places, buildings, structures or engines."

The Court of Appeals of New York, in the case of Burke vs. Witherbee, (98 N. Y., 562,) speaking of the obligation of the master in this respect (page 565,) say: "The defendants did not owe the duty to their workmen to furnish the best known or the best conceivable appliances: but they were under a duty to furnish reasonably safe and suitable appliances—such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or defective appliances."

This case is otherwise instructive. An employe in an iron mine was struck and killed by a descending car which became detached from the cable by which it was hauled out of the mine. The jury awarded a verdict for the plaintiff which the court below refused to set aside. Speaking of its own power in the premises, the Appellate Court (page 565,) say "There was no conflicting evidence upon the trial of this case, and

the sole question to be determined is, whether the undisputed facts justified the imputation of negligence to the defendants. It matters not that the jury have inferred negligence, and that the judges of the general term have also, although with some hesitation, upheld the verdict of the jury. A motion for a nonsuit having been made at the trial, we must be able, judging independently, sitting in review of the verdict and the judgment, to find that upon the whole case the inference of negligence could fairly and properly be drawn, or else the judgment should be reversed."

Referring to the deceased and others in the service of the defendant, the court, (page 567,) say: "They were just as capable to judge of its safety and adequacy as the defendants, and certainly would not have exposed their lives without some protest, if they had supposed there was any danger from the use of the hook, &c."

The rule of injury caused by *defective* tools, machinery or railway track, should not be the law of this case.

There is a standard of condition for these, and the servant may properly go about his work, relying upon the standard being maintained. He is not charged by the law with the impracticable duty of ascertaining the condition of tools and machinery or track before using them. It is wisely held that, in the absence of any apparent defect, he may assume them to be reasonably fit for use.

But there is no standard of degrees of curvature in the tracks of a station-yard, and it must be apparent to every one that there cannot be.

Even in the matter of tools and machinery, the servant cannot recover damages he may suffer from

defects of which he had knowledge, save under exceptional circumstances.

Frazier vs. Pennsylvania, &c. R. R. Co., 38 Pa. St., 104.
Griffiths vs. Gidlow, 3 H. & N., 648.
Assop vs. Yates, 2 H. & N., 768.
Leary vs. Boston &c. R. R. Co., 139 Mass., 580.

See also on this point other cases cited under head IV. of the brief.

The master is not held to the obligations of an insurer of the safety of his servant in respect of machinery, &c., although the rule is frequently stated by judges in terms that seem to involve this.

Cooley on Torts, 556-7, and cases cited in Note 1.
Pierce on Railroads, 370-1, and cases cited in Notes 1 and 2, on latter page.

As I have before said, the master is in practical effect held to the liability of insurer under a rule of law which submits the question to a jury of whether a particular curve of a track was safe. With this irresponsible and lawless body, as usually composed, the fact of an accident to a railway employee is conclusive of the company's negligence.

In Michigan &c. R. R. Co. vs. Austin, 40 Mich., 247, a switchman while standing on the foot-board of a locomotive-tender moving on a rough track of a siding in the company's yard, was thrown off and injured. Held, that this risk was an incident of the service. On page 250, the court say: "He knew the track was rough, and *that defective rails were often put into the side-tracks which were not used for general business.* He must have known that a road which was thus rough and uneven would entail serious risks, &c. * * * *I do not think the evidence tends to show that it is*

negligent for a railroad company to use rough materials for its yard lines."

Ft. Wayne &c. R. R. Co. vs. Gildersleeve, 33 Mich., 133.—An employe was killed while coupling cars, one of which was unusually low, making the coupling exceptionally dangerous. There was evidence tending to show that the danger was well understood by him. The court per Cooley, J., say, (page 136:) "In coupling it with other cars, peculiar caution was requisite, making it more liable to cause injury than would be a car of more modern construction. *Its use therefore made the employment more dangerous than it otherwise would be.* In that particular the case may be compared to that of a farmer, who, with knowledge on the part of himself and those in his employ, that a horse he has had in use is disposed to be fractious and unmanageable, continues nevertheless to use him in his business, &c. &c. &c., * * * And treating it as a question of such broad application, we do not perceive any ground upon which the plaintiff's case can safely be planted which comes short of this: that the employer is under obligation to his servants under all circumstances to make use of the safest known appliances and instruments, &c."

Ryan vs. Canada Southern Ry. Co., 10 Ontario Repts., (C. P. Div.,) 745; a trainman was killed by coming in contact with a "switch stand" in the station yard while he was holding onto the steps of a ladder on the side of a moving car. The negligence alleged against the company was that the switch stand was dangerously near the track. The trial judge directed a verdict for the defendant. Cameron, Chief Justice, says: "The switch stand was in its character a permanent structure; it was part

of the works of the railway when the plaintiff entered into the defendants' employment, and he took the risk of that employment. The stand was not dangerous *per se*. It was a passive force in causing the injury to the deceased—an injury that could not have happened if the deceased had not placed himself in the position to be injured thereby."

Rose, J., concurring, says: "The company was not guilty of any wrong in putting the standard in its position. For all that appeared it was in the best interest of the company to have it exactly where it was. It was not a source of danger to any employe, in the discharge of his duty while in his usual place, *i. e.*, to the brakeman, while attending to the brakes, to the switchman while switching, or to any other named employe. Then in what did the breach of duty consist? Unless it clearly appeared that the company required the deceased to be where he was at the time the accident occurred, and negligently exposed him to a danger of which he was not aware, but which was known to them, the company, in my opinion, should not be held liable."

The case also involved the question of contributory negligence, and the last named judge speaking on this point, says:

"In the present case it was not made to appear that the deceased in the performance of his duty was required to be where he was when he was struck, or that he did not know of the danger. If a doorway leading into a barn were too narrow to allow a wagon to pass with the driver walking alongside, and a servant driving a team drawing the wagon, should in a moment of forgetfulness, attempt to remain beside the wagon when it was passing through, and be injured, would he have a right of action against his employer?"

The foregoing are only a few of many cases, English and American, which affirm the same legal rules. They are the law of this case, and it follows that the defendant was guilty of no breach of duty to the unfortunate man who was killed, in *constructing* the siding on so sharp a curve.

So here, the sharpness of the curve in this track "made the employment more dangerous" than it otherwise would have been. But as in the case of the low car, the exceptional danger was here apparent; and unless this court is prepared to declare the law to be "that the employer is under obligation to his servant under all circumstances, to make use of the safest known appliances, defendant in this case is not liable, &c."

III.

If the testimony would justify an assumption, as I have shown it will not, that deceased met his death within the space on this track where the witness Campau said the drawheads would inevitably pass—*thus affording ground for the claim that this is a case of defective track*—there is nothing to show that the track had been in this condition for any length of time—long enough to charge the company with knowledge of it. Chief engineer Masson expressly testifies, that the track was originally staked out and laid on a curve of 180 radius.—Rec., pp. 63-4. It does not appear when the change occurred, or how long it had continued.

Keith, the fellow-servant of deceased, who had known the draw heads of cars to pass on this track, (when he does not state,) did not inform any one of the fact—probably because such an occurrence on a

curved track was not sufficiently unusual to emphasize itself on his mind. He did not testify that the place where he had before known draw heads to pass, was at or near the place of this accident.—Rec., p. 27.

Starting with the track properly laid, the company cannot be made liable for injuries to its servants caused by its subsequently getting out of condition, except on a charge in the declaration, supported by specific proof, of a neglect of the duty to maintain. And either actual notice to the company, through its proper agent, of the defective track, or a continuance of the defect long enough to make ignorance of the fact itself negligence, must be shown.

The rule as to machinery, &c., which has become defective in use, is correctly stated by Mr. Pierce in his work on railroads, p. 373: "The company's knowledge of a defect must be proved, in order to make it liable for the consequences; but such knowledge may be shown by circumstances, as the length of time it existed before the injury, or by a notice given to an employe who had an express or implied authority to receive it."

Beach on Contributory Negligence, (Sec. 123,) states the rule as follows: "Personal negligence is the gist of the action, and it must, therefore, appear, to render the master liable, that he knew, or from the nature of the case ought to have known, of the unfitness of the means of labor furnished to the servant, and that the servant did not know or could not reasonably be held to have known of the defect. Knowledge on the part of the employer, and ignorance on the part of the employe are of the essence of the action."

In a foot note the author refers to numerous American and English cases in support of the text.

It is in the nature of all large business enterprises like that of operating a railroad, that the detail work in every department shall be entrusted to sub-agents. The officers and heads of departments cannot have daily supervision of each man in the service, nor of each piece of machinery, separate tool or appliance. This would be impossible, and impossibilities the law does not demand. What it does not demand, it cannot treat the neglect to do as a fault. The duty it imposes on these officers and heads of departments, in respect of all employes, is the possible and practicable one of painstaking care in selecting competent men for the service, and in providing proper tools, machinery and appliances for their use, and thenceforth of exercising a careful supervision of the men, tools, machinery and appliances, for the detection of any falling away from the required standard of efficiency.

This supervision required is a practical one. It is not such as to afford a daily personal knowledge that all is well,—which would be impossible. Hence the reasonableness of the law in giving to those persons who stand for and in place of the master, a reasonable time to learn that a man in the service has become incompetent for his duties, or that any tool, appliance or piece of machinery has become defective—in the absence of proof of knowledge.

IV.

Deceased negligently tried to made the coupling from the inside of the curve. There was no excuse in the circumstances and facts of the case—as I have already pointed out—for his not doing the work from the other side. Therefore he alone was to blame for

the accident, and defendant is not liable. I invite the court's particular attention to the testimony on this point, and to what I have elsewhere said in the brief on the subject.

It is the law of this court, as it is of England, and of nearly every State court, that contributory negligence will defeat recovery.

Railroad Co. vs. Jones, 95 U. S., 439.
Railroad Co. vs. Houston, 95 U. S., 697.
Schofield vs. Railroad Co., 114 U. S., 615.

What was said by this court in the Randall case, already cited, is fully applicable here, with only slight change of language: "It could have been safely and efficiently worked by standing 'on the opposite side of the curve,' 'using reasonable care;' and it was unnecessary, in order to work it, to stand as the plaintiff did," on the inside of the curve.

The rule of the servant's sole responsibility for injuries he may suffer from defects in machinery, &c., of which he has knowledge, is recognized and conceded in that other rule, supported by an unbroken chain of authority, which makes the master liable when the defects have been brought to his notice and he has given the servant assurance that the defects would be repaired, thus putting the servant off his guard in respect of the defects,—which is the true and only reason of the rule.

This court has affirmed the law of both rules in the case of Hough vs. Railway Co., 100 U. S., 224-5.

I do not overlook the statement of the opinion in the case of Hough, that the engineer's knowledge "of the alleged defect, was not, *under the circumstances, and as a matter of law*, absolutely conclusive of want of due care on his part." There is this difference between the two cases.—In that case there was ground for an

honest difference of opinion as to the safety of the engine, while in this case the honest judgment of all intelligent mankind, must pronounce the act of deceased grossly negligent.

At the same time, I respectfully suggest to the court something more than a doubt of the soundness of this statement of the law in the Hough case. Why should the question of the engineer's want of due care in such a case, be left to any body of men or tribunal to determine? If the engineer was competent, he was himself the best possible judge of the safety of the engine; and the fact that he elected to continue to operate it, knowing that the defects still existed, should have been deemed equally conclusive against his own negligence and that of the railway company, *quoad* his claim for damages. And so I should say of every other case of like character.

Upon what reason should there be any question for judicial determination in such a case? The servant knew all the facts, and was as competent to measure the danger as any one else in the service or as even the master himself—certainly competent to decide for himself. He deliberately made the decision. In doing so he was either negligent or not negligent. If negligent, he could not recover; if not negligent in using the machine in such condition, it would seem to follow that the master could not be charged with negligence as to the servant in permitting him to do so.

There is a wide difference in respect to this question, between this class of cases including the one at bar, and the reported cases involving injury to servants who, although having knowledge of the defects, were not competent to form an opinion of the safety of the machinery or appliance. This distinction is

often lost sight of, as it was by this court, I respectfully submit, in the case of Hough.

In Abend vs. Terre Haute, &c., R. R. Co., 111 Ill., 202, plaintiff's intestate was in defendant's service in connection with the operation of trains upon its road. Instead of taking a seat in a car provided for the purpose, as he should have done, he got on the locomotive. A collision subsequently occurred, and he was killed. The court say, (page 208,) "We are of opinion the proofs, so far from showing the deceased was exercising due care when the accident occurred, established beyond controversy he was guilty of such negligence as to absolutely forbid a recovery."

Again, (on page 210,) "It is a fundamental principle the plaintiff cannot recover in any case for injury occasioned by negligence merely which would have been avoided by the exercise of ordinary care and prudence on the part of the plaintiff himself."

So deceased here deliberately elected an unsafe position, instead of one where there was no danger, being free to choose.

Why should this company be punished for the consequences?

In the case of Powers vs. N. Y., &c., R. R., 98 N. Y., 274, plaintiff's intestate was killed in using a defective hand-car. The court say, (page 278,) "Working on the hand-car as he did, with ample knowledge in regard to its operation, and fully aware of its condition, there would seem to be no ground for claiming that there was any question of fact for the consideration of the jury as to the intestate's knowledge of the risk he incurred in using the car, &c."

Again, (on page 280,) "It is apparent, we think, under the facts presented, that the intestate, with full knowledge of the defects in the car, assumed the re-

sponsibility of working on the same, and the risks arising therefrom, and that no liability was incurred by the defendant by reason of the accident which caused his death."

As I have heretofore pointed out, the sharpness of the curve of this track was apparent to the eye. Deceased had ample time and opportunity to observe it. He was experienced in the business, and needed no one to admonish him of the danger. He assumed all responsibility of the work "and the risks arising therefrom."

V.

Importance was attached, by plaintiff's counsel on the trial, to the fact that Keith, who had charge of the engine's movements and witnessed deceased's attempt to make the coupling, did not inform him of the danger of doing it from that side of the curve; nor tell him that draw-heads had been known to pass each other on that track. It would have been better, as this sad accident might then have been avoided, if Keith had been thoughtful enough to do so. But his neglect to do it is not negligence imputable to the defendant company.

I have called attention to the state of the pleading in respect to this and another point.

In the first place, Keith, within all the definitions of the relationship to be found in the books, was only a fellow-servant with deceased, and therefore defendant cannot be liable to the plaintiff, under the facts here, for any of his acts of commission or omission.

Randall vs. Railroad, 109 U. S., 478, and cases there cited in a note at p. 484.

Cooley on Torts, 543-4, and cases referred to in Note 1, on latter page.

A very instructive and discriminating discussion of the fellow-servant doctrine in its relation to the employer's liability, will be found in 22 Am. & Eng. R. R. cases, 319, in a note by Mr. Merritt Starr, a member of the bar of Chicago.

The case in this court of the Railroad Co. vs. Jones, (95 U. S. 439,) is in point.

There the employe proved that his foreman directed him "to jump on anywhere," and he got on the pilot of the locomotive and was injured by a subsequent collision. Assuming the negligence of defendant, the court held the contributory negligence of the plaintiff prevented his recovery. On page 443, it is said: 'The knowledge, assent or direction of the company's agents as to what he did, is immaterial. * * * As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non-compos*."

In the second place, if defendant were a natural person, and had stood by and witnessed deceased's effort to make the coupling, having all of Keith's knowledge of the situation and its dangers, a failure to warn deceased of the danger would not, in the facts and circumstances of this case, make defendant liable. The state of the track was apparent: deceased could see for himself. He was an experienced yardman, and as capable of measuring the degree of danger involved in what he was doing, as Keith, or any other person. Any suggestion which Keith might have made to him of the risk he was taking, would probably have been received,—as Keith said he would himself have considered it,—as an insult. Such men do

not take kindly to advisory suggestions from their fellows. There is implied in such suggestions an assumed superiority that is offensive to them.

VI.

The propriety of the court's withdrawing the case from the jury, if the evidence was insufficient to warant a verdict for the plaintiff, cannot be doubted.

Improvement Co. vs. Munson, 14 Wall, 442.
Schofield vs. Railroad Co., 114 U. S., 615.
Pleasants vs. Fant, 22 Wall., 116.

There will be found on page 70 of the Record, a statement as to something shown by the evidence, and something admitted by defendant. This is so evidently one of the running comments of plaintiff's counsel, made in the progress of the trial, and recorded by the stenographer, which through oversight, was not stricken out of the stenographer's copy of the trial proceedings when it was revised into a bill of exceptions, that this court cannot be misled into treating it as a substantive part of the case here.

Instead of the evidence showing "there was not a full gang employed to make the coupling," it conclusively shows the contrary. The only witness on the subject is Morgan. Morgan says, "The usual crew is one yardman,—a switchman in charge of an engine,—and two assistants."—Rec., p. 67.

Keith testified to number of the crew, &c.—Rec., pp. 17, 18, 22 and 70.

The form of the statement sufficiently protects defendant from its being understood in this court as an admission of fact made by or in behalf of the defendant.

Several exceptions were taken, on behalf of the plaintiff, in the progress of the trial, to the rulings of the court in matters of evidence. And at the conclusion of the testimony several requests were submitted on the part of the plaintiff for instructions to the jury, which were refused and exceptions taken. In view of the disposition finally made of the case, by the court's withdrawal of it from the jury, the question of whether there was error in any of these rulings becomes immaterial.

E. W. MEDDAUGH,
Counsel for Defendant in Error.

122-197

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 266.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, AND ADOLPH WILLIAM VON KESSLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 17, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 266.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, AND ADOLPH WILLIAM VON KESSLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Caption	3	2
Transcript from district court	4	2
Clerk's certificate	4	2
Writ of error	5	2
Summons	6	3
Notice of appearance	7	4
Complaint	8	4
Schedule	14	8
Answer	17	10
Notice of motion for bill of particulars	18	10
Affidavit of J. F. Degener	20	11
Request for bill of particulars	22	13
Order for bill of particulars	24	14
Bill of particulars	25	14
Bill of exceptions	27	15
Opening address of Mr. Clarke	27	15
Remarks of Judge Brown	37	21
Plaintiffs' requests	59	36
Minutes of trial	62	37
Verdict	63	38
Judgment	64	38
Assignment of errors	65	39
Joinder in error	67	40

	Original.	Print.
Citation	68	41
Minutes of hearing	69	41
Decision of Judge Wallace	70	41
Judgment	71	42
Assignment of errors	75	42
Joinder in error	78	43
Citation	80	44
Proof of service of citation	81	44

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiff, and Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Keesler, defendants, a manifest error hath happened to the great damage of the said the United States of America, plaintiff, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-four, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] TIMOTHY GRIFFITH,
Clk.

The foregoing writ is hereby allowed.

ADDISON BROWN.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to eighty-one, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of the United States of America, plaintiff in error, against Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

(Indorsed:) U. S. Supreme Court. The United States of America, plaintiff in error, against Clement A. Auffmordt et al., defendant in error. Writ of error. Service of a copy of the within is hereby admitted this

this May 24, 1884. Tremain & Tyler, atty's for deft's. U. S. circuit court. Filed May 26, 1884. Timothy Griffith, clerk.

3 (On cover:) Circuit court of the United States, southern district of New York. The United States of America, plaintiff in error, against Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, defendants in error. Error book. Elihu Root, United States attorney; Tremain & Tyler, attorneys for defendants. U. S. circuit court. Filed Ap'l 7th, 1884. Timothy Griffith, clerk.

4 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE UNITED STATES OF AMERICA
against
CLEMENT A. AUFFMORDT, JOHN F. DEGENER, William Degener, & Adolph William Von Kessler.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and eighth.

[L. S.] SAM'L H. LYMAN,
Clerk.

ELIHU ROOT,
Att'y for the United States, Pl'ff & Appellant.
TREMAIN & TYLER,
Att'ys for Deft's & Appellees.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said district court before you, between the United States of America, plaintiff, and Clement A. Auffmordt, John F. Degener, William Degener, and Adolph William Von Kessler, defendants, a manifest error hath happened to the great damage of the said plaintiff, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the southern district of New York in the second circuit, together with this writ, so that you may have the same at New

York on the first Monday of April, eighteen hundred and eighty-four, in the said circuit court, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the
6 said Supreme Court, the twentieth day of March, in the year of our Lord one thousand eight hundred and eighty-four.

[L. S.] TIMOTHY GRIFFITH,
Clerk.

The foregoing writ is hereby allowed.

ADDISON BROWN.

(Endorsement:) U. S. Supreme Court. The United States of America, plaintiff in error, against Clement A. Auffmordt et als., defendants in error. Writ of error. Due service of a copy of the within is hereby admitted March 20, 1884. Tremaine & Tyler, att'y's for def'ts.

United States district court for the southern district of New York.

THE UNITED STATES OF AMERICA
against
JOHN F. DEGENER, WILLIAM DEGENER, Adolph William Von Kessler, Clement A. Auffmordt.

Sec. 2839 and 2864, R. S.
Sec. 12, act June 22, 1874.

To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the United States attorney for said district within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the honorable Addison Brown, judge of the district
7 court of the United States for the southern district of New York, at the city of New York, this 30th day of September, in the year one thousand eight hundred and eighty-two.

[L. S.] SAMUEL H. LYMAN, *Clerk.*
STEWART L. WOODFORD,
United States Attorney.

Office and post-office address, U. S. court and post office building, Broadway and Park Row, New York.

(Endorsement:) United States district court, southern district of New York. The United States of America vs. John F. Degener, William Degener, Adolph William Von Kessler, Clement A. Auffmordt. Summons. Stewart L. Woodford, United States attorney. To the defendants within named. Take notice that upon default judgment will be taken for the sum of dollars, in money, with interest from the day of , 18 , besides costs. Stewart L. Woodford, United States attorney. Filed Jan'y 8, 1883. Due service of this summons is hereby admitted for the within defendants. Tremain & Tyler, att'ys for def'ts. Oct. 3, 1882.

United States district court, southern district of New York.

THE UNITED STATES OF AMERICA *against* JOHN F. DEGENER, WILLIAM DEGENER, Adolph William Von Kessler, and Clement A. Auffmordt.	Notice of appearance.

SIR: Please take notice that the defendants John F. Degener, William Degener, Adolph W. Von Kessler, and Clement A. Auffmordt appear in this action, and that we are retained as attorneys for them therein, and demand that a copy of the complaint, and all papers in this action be served on us at our office, number 167 Broadway, New York City.

Dated New York, October 2, 1882.

Yours, &c.,

TREMAINE & TYLER,
Attorneys for Defendants.

Office and post-office address, No. 167 Broadway, N. Y. City, N. Y.

To STEWART L. WOODFORD,
U. S. Dist. Att'y and Plaintiff's Attorney.

(Endorsement:) U. S. district court. United States of America ag'st John F. Degener. Notice of appearance of defendants. Tremaine & Tyler, attorneys for defendants. Due and timely service of a notice, of which the within is a copy, admitted this day of , 1882. Plaintiff's attorney.

United States district court, southern district of New York.

THE UNITED STATES OF AMERICA *vs.* CLEMENT A. AUFFMORDT, JOHN F. DEGENER, William Degener, Adolph William Von Kessler.	

9 The United States of America, by Stewart L. Woodford, its attorney for the southern district of New York, complains of the above named defendants, and states to the court:

That the said defendants heretofore, to wit, on the dates mentioned in the column marked "date of entry," in the schedule hereto annexed, which said schedule is made a part of this complaint, at the city of New York, in said southern district of New York, were then and there copartners in trade, under the firm name and style of C. A. Auffmordt & Co.

That as such copartners the said defendants, at the city of New York, in said southern district of New York, on or about the dates mentioned in the annexed schedule in the column designated "date of entry," were the owners, agents, or consignees of certain goods, wares, and merchandise, to wit, certain ribbons, described by marks and numbers in the column

in said schedule designated "marks and numbers," of the values then and there described in said schedule in the column designated "true value," and then and there imported into the United States and brought into the port of New York from certain foreign ports or places described in said schedule in the column designated "where from," by way of certain other foreign ports or places described in said schedule in the column designated "via," in the ships or vessels named in said schedule in the column designated "name of vessel," which said goods, wares, and merchandise were then and there subject to the payment of ad valorem duties to the United States.

That afterwards, to wit, on or about the dates described in said schedule in the column designated "date of entry," at the office of the collector of the district of the city of New York, the said defendants made entries in writing of said goods, wares, and merchandise, as required by law, and produced to the said collector invoices thereof, purporting to be invoices of goods, wares, and merchandise procured otherwise than by purchase, and to be signed by the manufacturers or owners thereof, or by the duly authorized agents of such manufacturers or owners, and to contain true and full statements of the actual market values of said goods, wares, and merchandise at the times and places when and where the same were procured or manufactured, and of all charges thereon, and of certain discounts, bounties, and drawbacks actually allowed thereon.

That the said goods, wares, and merchandise of which entries were made and invoices produced as aforesaid, being then and there subject to the payment of ad valorem duties, were, with design to evade the payment of duties thereon, or some part thereof, not invoiced according to the actual cost thereof at the place of exportation.

That the said defendants knowingly made or attempted to make entries of said goods, wares, and merchandise, by means of certain invoices thereof, produced to the said collector at the times aforesaid, which were false invoices, in this, that the said goods, wares, and merchandise, at the time of making said invoices, were obtained by the owners thereof by purchase; that said invoices, then and there, were signed by some persons other than the manufacturers or owners of said goods, wares, and merchandise, or the duly authorized agents of such manufacturers or owners; that the actual market values of said goods, wares, and merchandise at the times and places when and where the same were manufactured or procured were different and greater sums than those stated in said invoices as such market values; that the charges thereon were other and greater than the charges stated in said invoices, and that no such discounts, bounties, and drawbacks had actually been allowed thereon, as were stated in said invoices.

That the said defendants, on or about the dates aforesaid, at the said office of the said collector, knowingly made or attempted to make entries of the said goods, wares, and merchandise by means of certain documents and papers, to wit, by means of certain declarations endorsed upon the said invoices, purporting to be made by the manufacturer of said goods, wares, and merchandise, or by his duly authorized agent, and to be in all respects true; and that said declarations were false and fraudulent documents and papers, in this, that they were not made by the manufacturer of said goods or by his duly authorized agent; that they contained false and untrue

statements, in this, to wit, that said declarations stated that the
11 said invoices, on which the declarations were endorsed, were in all
respects true; and that they contained full and true statements of the actual market values of such of the said goods, wares, and merchandise as were subject to any ad valorem rate of duty, or to any duty, regulated or directed by law to be estimated or based upon the value of the square yard, or of any other specified quantity or parcel, at the times and places when and where the same were manufactured or procured, and of all charges thereon; and that they contained no discounts, bounties, or drawbacks but such as had been actually allowed thereon; and that no different invoices had been or would be furnished to any one.

That the said defendants, on or about the dates aforesaid, at the said office of the said collector, knowingly made or attempted to make entries of the said goods, wares, and merchandise by means of certain other documents and papers, to wit, by means of certain documents and papers known as entries in writing, and which were false and fraudulent documents and papers in this, that whereas said entries in writing purporting to contain just and true accounts of the said goods, wares, and merchandise, and to state the actual market values thereof at the times and places when and where the same were manufactured or procured, and all charges thereon, and to contain no discounts, bounties, and drawbacks other than such as had been allowed on the same, the said entries in writing did not contain just and true accounts of the said goods, wares, and merchandise, and did not state the actual market values thereof at the times and places when and where the same were manufactured or procured, and all charges thereon, and did contain discounts, bounties, and drawbacks other than such as had been actually allowed on the same.

That the said defendants, on or about the dates aforesaid, at the said office of the said collector, knowingly made or attempted to make entries of the said goods, wares, and merchandise, by means of certain statements endorsed upon the said entries in writing, and made and sworn to before the said collector by one of the said defendants on behalf of the said C. A. Auffmordt & Co., said statements so made and sworn to being in substance that the defendant, taking the oaths, did solemnly and truly swear
that the invoices and bills of lading produced to the said collector
12 were the true and only invoices and bills of lading received of the said goods, wares, and merchandise, imported for account of any person whomsoever, for whom the said defendant was authorized to enter the same; that the said invoices and bills of lading were in the state in which they were actually received by the said defendant, and that he did not know or believe in the existence of any other invoices or bills of lading of the said goods, wares, and merchandise; that the entries delivered to the said collector contained just and true accounts of the said goods, wares, and merchandise, according to the said invoices and bills of lading; that nothing on his part, nor to his knowledge on the part of any other person, had been concealed or suppressed, whereby the United States might be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; that the said invoices and declarations therein were in all respects true, and were made by the persons by whom the same purport to have been made; and that, if at any time thereafter, the said de-

fendant discovered any errors in the said invoices, he would immediately make the same known to the said collector; that he did further solemnly and truly swear, that to the best of his knowledge and belief, certain persons (named in said oaths) were the owners of the said goods, wares, and merchandise, mentioned in the said entries; that the invoices produced represented the actual cost or fair market values, at certain places (named in said oaths), of the said goods, wares, and merchandise, all charges thereon, and no other discounts, bounties or drawbacks but such as had been actually allowed on the same; which said statements so made and sworn to were false and fraudulent in each and every particular thereof.

That the said defendants, on or about the dates aforesaid, knowingly made or attempted to make entries of the said goods, wares, and merchandise, by means of certain false and fraudulent practices, to wit, by means of instructions given by the said defendants to Jean Adam Senn, of Zofingen, the manufacturer of the said goods, wares, and merchandise, to invoice the same at the values stated in the said invoices, which values were false and fraudulent and below the actual market values of the said goods, wares, and merchandise at the times and places when and where the same were manufactured or procured.

13 That the said defendants did, with intent to defraud the revenue, make or attempt to make the entries aforesaid, of the said goods, ware, sand merchandise, by means of the aforesaid fraudulent and false invoices, affidavits, letters, and papers, and by means of the said false statements, and were guilty of the acts and omissions aforesaid, by means whereof the United States has been deprived of the lawful duties, or some portion thereof, accruing upon the said goods, wares, and merchandise embraced and referred to in the said invoices, affidavits, letters, papers, and statements, and affected by the said acts and omissions.

All of which said acts herein complained of were done with an actual intention to defraud the United States, and against the form of the statutes of the United States in such case made and provided.

Whereby, and by reason of all and singular the premises aforesaid, and by force of the statutes of the United States in such case made and provided, the said defendants have forfeited to the United States the values of said goods, wares, and merchandise, set forth in the schedule hereto annexed in the column designated "True value."

Wherefore said plaintiff demands judgment against the said defendants, Clement A. Auffmordt, John F Degener, William Degener, Adolph William Von Kessler, for the sum of said values so forfeited, or three hundred and twenty-one thousand five hundred and nineteen $\frac{29}{100}$ dollars, with interest and the cost of this action.

Dated New York, January 8, 1883.

(Sgd.) STEWART L. WOODFORD,

Attorney for the United States for the Southern District of New York.

Date of entry.	Name of vessel.	Via.	Where from.	Marks and numbers.	True value.
Sept. 11, '79	Wieland	Hamburg	Zofingen	6 cases, A. O. C 146–151	$3,846 97
24,	Westphalia	do	do	5 " S. Z. R 152–156	3,406 43
Oct. 2,	France	Havre	do	6 " " 151–162	4,103 10
9,	Lessing	Hamburg	do	4 " " 163–166	2,821 [illegible]
20,	City of Richmond	Liverpool	do	8 " " 167–174	5,423 46
27,	Donau	Bremen	do	5 " " 175–179	4,211 73
Nov. 5,	Frisia	Hamburg	do	8 " " 180–187	5,559 57
20,	Gellert	do	do	8 " " 188–195	6,117 63
20,	do	do	do	8 " " 196–203	5,997 66
28,	Lessing	do	do	8 " " 204–311	6,229 87
Dec'r 23,	Wieland	do	do	5 " " 222, 227–230	9,708 00
23,	do	do	do	5 " " 221, 223–226	
23,	Frisia	do	do	7 " " 231, 2, 3, 5, 7, 8, 9	
23,	do	do	do	2 " " 234, 236	6,212 91
23,	Belgenland	Antwerp	do	5 " " 212, 15, 16, 18, 19	
23,	do	do	do	4 " " 213, 14, 17, 20	6,417 70
Jan'y 13, '80	Gellert	Hamburg	do	3 " " 252, 5, 7, —	
13,	do	do	do	4 " " 260–263	
13,	do	do	do	2 " " 559, 264	10,186 05
13,	do	do	do	5 " " 251, 3, 4, 6, 8	
20,	City of Berlin	Liverpool	do	9 " " 265–273	8,530 24
30,	Wieland	Hamburg	do	9 " " 281, 289	6,157 40
23,	Suevia	do	do	7 " " 274, 280	5,805 20
Feb'y 7,	Frisia	do	do	11 " " 290–300	7,715 85
16,	France	Havre	do	7 " " 381, 385, 8, 9	
16,	do	do	do	3 " " 306, 7, 10	6,959 69
27,	Labrador	do	do	12 " " 321–332	8,702 91
March 2,	Freja	do	do	10 " " 311–320	10,828 40
15] 30,	Adriatic	Liverpool	do	6 " " 368, 9, 373–376	
30,	do	do	do	3 " " 370–372	7,758 35
9,	Baltic	do	do	13 " " 333–345	10,774 67
13,	Suevia	Hamburg	Basle	7 " " 346–351, 356	
13,	do	do	Zofingen	6 " " 352–355, 7, 8	10,571 22
22,	City of Brussels	Liverpool	do	6 " " 361, 363–367	
22,	do	do	do	3 " " 359, 360, 362	6,880 12
April 1,	Canada	Havre	do	5 " " 360–384	
1,	do	do	do	3 " " 377, 379	7,501 12
8,	Labrador	do	do	3 " " 387–389	
8,	do	do	do	2 " " 285, 286	5,265 40
17,	St. Laurent	do	do	2 " " 292, 293	
17,	do	do	do	2 " " 390, 391	3,849 44
26,	Brittanic	Liverpool	do	4 " " 394–397	4,228 90
May 3,	France	Havre	do	4 " " 399–402	
3,	do	do	do	1 " " 398	5,413 28
11,	Baltic	Liverpool	do	3 " " 403–405	
11,	Patagonia	do	do	2 " " 403–407	5,257 25

	21,	Celtic	do	do	5	"	"	408-412	5,651 79
June	1,	Brittanic	do	do	5	"	"	413-417	5,091 34
	14,	Germanic	do	do	4	"	"	418-421	4,472 75
	21,	City of Richmond	do	do	3	"	"	422-424	3,449 36
	28,	Celtic	do	do	5	"	"	425-429	4,904 53
July	8,	Amerique	Havre	do	4	"	"	430-433	4,197 11
	15,	France	do	do	5	"	"	434-438	4,716 28
	21,	Canada	do	do	5	"	"	439-443	4,972 70
July	30, '80	Labrador	do	do	3	"	"	444-446	82,537 02
Aug.	14,	Adriatic	Liverpool	do	5	"	"	447-551	4,712 60
	20,	Amerique	Havre	do	3	"	"	452, 453, 455	3,942 34
	28,	France	do	do	4	"	"	456-459	3,495 41
Sept.	6,	Canada	do	do	4	"	"	460-463	3,290 10
	9,	Labrador	do	do	4	"	"	464-467	3,198 46
	20,	City of Berlin	Liverpool	do	4	"	"	468-471	3,489 63
	23,	Amerique	Havre	do	4	"	"	472-475	3,577 83
	30,	France	do	do	4	"	"	476-479	3,422 97
16]									
Oct.	11, '80	City of Chester	Liverpool	Zofingen	2 cases, S. Z. R			480-481	2,751 26
	11,	do	do	do	1	"	"	482	
	30,	Germanic	do	Basle	3	"	"	483-485	2,263 71
Nov.	12,	Fer'd Lesseps	Havre	do	2	"	"	486-487	1,742 25
Dec.	16,	Caldora	do	Zofingen	4	"	"	488-491	2,596 33
Jan'y	3, '81	France	do	do	4	"	"	492-495	3,529 92
	14,	Canada	do	do	4	"	"	496-599	3,583 18
	19,	Gellert	Hamburg	Basle	4	"	"	500-403	3,994 84
Feb'y	26,	Canada	Havre	Zofingen	3	"	"	408-410	3,104 10
	5,	Baltic	Liverpool	do	4	"	"	504-507	3,551 54
May	19,	Servia	do	do	1	"	"	511	482 52
July	1,	Amerique	Havre	do	2	"	"	514, 515	1,037 43
	22,	France	do	do	2	"	"	516, 517	1,777 67
Aug.	3,	Servia	Hamburg	do	1	"	"	518	932 22
	29,	Silesia	do	do	1	"	"	519	832 56
Oct.	1,	France	Havre	do	1	"	"	520	1,201 79
	11,	Silesia	Hamburg	do	3	"	"	521-528	2,307 92
	17,	Germanic	Liverpool	do	1	"	"	524	837 45
	28,	Amerique	Havre	do	2	"	"	525, 523	1,144 82
Nov.	17,	Bohemia	Hamburg	do	1	"	"	527	686 20
Dec.	12,	St. Laurent	Havre	do	1	"	"	528	449 59
Jan.	10, '82	Celtic	Liverpool	do	3	"	"	529-531	2,235 25
	17,	Labrador	Havre	do	3	"	"	532-534	2,183 85
	27,	Amerique	do	do	3	"	"	535-537	2,127 85
Feb.	11,	France	do	do	2	"	"	538, 539	1,292 76
	11,	do	do	do	2	"	"	540, 541	1,526 50
Mar.	31,	Canada	do	do	2	"	"	544, 545	1,627 68
	3,	St. Germain	do	do	2	"	"	542, 543	1,466 74
									321,519 29

(Endorsement:) United States district court, southern district of New York. The United States of America vs. Clement A. Auffmordt, John F. Degener, William Degener, Adolph William von Kessler. Complaint. Stewart L. Woodford, U. S. attorney. Service of a copy of the within complaint is hereby admitted this day. January 8, 1883. Tremain & Tyler, att'ys for def'ts.

17 United States district court, for the southern district of New York.

THE UNITED STATES OF AMERICA
vs.
CLEMENT A. AUFFMORDT, JOHN F. DEGENER, WILLIAM DEGENER, ADOLPH WILLIAM VON KESSLER. } Answer.

The above-named defendants, by Tremain & Tyler, their attorneys, answer the complaint in this action as follows:

Except in so far as said complaint alleges that the defendants were copartners engaged in the business of merchants and importers of foreign merchandise into the port of New York, and except in so far as said complaint alleges that said defendants made entry as prescribed by law, and paid lawful duties upon each and every of their importations into said port during the time mentioned in said complaint—in respect to all of which importations and entries, defendants aver that they paid all the duty lawfully due thereon, and complied with all the requirements of law in respect to said importations and entries, these defendants deny each and every allegation in said complaint contained.

Wherefore defendants demand that the complaint in this action be dismissed.

TREMAIN & TYLER,
Defendant's Attorneys, 167 *Broadway, N. Y.*

(Endorsemen':) U. S. district court. The United States of America vs. Clement A. Auffmordt, John F. Degener, William Degener, Adolph Wllliam Von Kessler. Answer. Tremain & Tyler, def'ts' att'ys, 167 B'way, N. Y. To Stewart L. Woodford, esq., U. S. att'y. Sir:

18 You will please take notice that the within is a copy of the answer of defendants to the complaint to this action—and that the original of which the within is a copy was this day duly filed in the office of the clerk of the court. Dated Jan. 8, 1883. Y'rs, &c., Tremain & Tyler, def'ts' att'ys, 167 B'way. To Stewart L. Woodford, esq., U. S. dist. att'y, P. O. building.

United States district court, southern district of New York.

UNITED STATES OF AMERICA
against
CLEMENT A. AUFFMORDT, JOHN F. DEGENER, and others.

SIR: Please to take notice that upon all the papers and proceedings had in this action, and also upon the affidavit of John F. Degener, verified January 16, 1884, a copy whereof is herewith served, the defendants will

move at the term of this court, to be held at the court rooms, New York City, on the 22d day of January, 1884, at 10 a. m., or as soon thereafter as counsel can be heard, for an order compelling the plaintiff to serve a bill of particulars in conformity with the defendants' demand, dated January 10, 1883, heretofore served upon the district attorney; and particularly that the said bill of particulars shall contain a statement of the alleged foreign cost of each of the importations referred to in the complaint, stating whether said cost be the cost of manufacture and production thereof, or whether said cost be the cost of purchase of said merchandise.

And also the alleged foreign market value at the principal markets of the country whence the goods, wares, and merchandise mentioned in the complaint were exported, and what places were the places of the
19 principal markets of said country, as claimed by the plaintiff; and also the entered and invoice value of each of their importations respectively, as claimed by the plaintiff to have been presented by the defendants at the New York custom-house, and the dutiable value thereof as appraised by the customs officers.

And also the amount of duty on each and every of the importations mentioned in the said complaint claimed to have been withheld from the Government and to be due and unpaid by the defendants on said importations and each thereof; together with a statement of the particulars according to which said duty so claimed, as aforesaid, to have been unlawfully and knowingly withheld, is or has been estimated.

And also the alleged time or times when, and places where, as mentioned in the complaint, defendants gave instructions to the exporters in respect to the alleged dutiable value of said importations and to whom, and if in writings, the dates thereof respectively, and by whom written.

And also such other and further particulars as are required by law, or may, on deliberation, be found to be just and proper in the premises, or to which the defendants may be entitled, arising out of all the allegations of said complaint.

And that on service of said bill of particulars, or on failure to serve the same, the defendants shall have the usual legal rights incident to such service or failure.

And also that defendants shall have such other and further order or relief as may be just and proper in the premises.

Dated N. Y., Jan. 16th, 1884.

Yours, &c.,

TREMAIN & TYLER,
Att'ys for Def't.

20 United States district court, southern district of New York.

UNITED STATES OF AMERICA
against
CLEMENT A. AUFFMORDT, JOHN F. DEGENER, and others.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

J. F. Degener, one of the defendants in the above-entitled action, deposes and says:

This action is brought for the alleged undervaluation of certain impor-